TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 87

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, ET AL., APPELLANTS,

vs.

UNITED AIR LINES, INC., CATALINA AIR TRANSPORT AND CIVIL AERONAUTICS BOARD

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED MAY 22, 1953

Jurisdiction postponed June 15, 1953

SUPREME COURT OF THE UNITED STATES

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 24, 1953.

[fol. 1] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31638

UNITED AIR LINES, INC., a corporation; and CATALINA AIR TRANSPORT, a corporation, Plaintiffs,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Edmund G. Brown, Attorney General of the State of California; Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public Utilities Commission of the State of California, Defendants

COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTION—filed June 25, 1952

Now come the plaintiffs above named and, for cause of action against the defendants above named, allege:

I

That the plaintiff Catalina Air Transport is, and at all times herein mentioned was, a corporation organized and incorporated under the laws of the State of California.

II

That the plaintiff United Air Lines, Inc. is, and at [fol. 2] all times herein mentioned was, a corporation organized and incorporated under the laws of the State of Delaware and is a citizen resident of the State of Delaware.

III

That the defendant Public Utilities Commission of the State of California is a regulatory commission of the State of California; and the defendants Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, are the members of said Commission and collectively constitute said Commission, and all of the members of said Commission are citizens and residents of the State of California, and have and maintain an office within said State, District and Division.

IV

Prior to any of the times mentioned herein the Civil Aeronautics Board duly and regularly granted, under the Civil Aeronautics Act of 1938 (49 USCA Sections 401-705), a Certificate of Public Convenience and Necessity to Catalina Air Transport, dated October 13, 1939, which, as amended, authorizes it to engage in air transportation of persons and property between the mainland of the United States, at Los Angeles-Wilmington-Long Beach, Los Angeles County, California, and Avalon on Santa Catalina Island, and over the intervening high seas.

V

On the 7th day of March, 1946, said Catalina Air Transport entered into a contract with United Air Lines, Inc., which was duly approved by the Civil Aeronautics Board, by which it was agreed that United would perform and discharge all of the obligations of Catalina Air Transport under such Certificate of Convenience and Necessity, and should operate certain specified flights between said points, and should provide the airplanes and other facilities necessary to conduct air transportation (6 C.A.B. 1041). The Civil Aeronautics Board in its order provided that [fol. 3] agreements on passenger and air express rates between Catalina Air Transport and United Air Lines, Inc. should be reduced to writing and filed with the Board for approval (6 C.A.B. 1047). Pursuant to that direction United Air Lines, Inc. filed with the Civil Aeronautics Board an agreement dated June 26, 1946, covering the fares

to be charged between the mainland of the United States and Santa Catalina Island. This agreement was approved by the Civil Aeronautics Board. Subsequently, and as the rates were changed, similar agreements were filed with the Civil Aeronautics Board in the nature of amendments to the original agreement of June 26, 1946. The amendatory agreements are dated, respectively, January 30, 1948, April 11, 1949, and July 10, 1951. These agreements were approved by the Civil Aeronautics Board. Said certificate and said agreement of March 7, 1946, have ever since continued in full force and effect, and operations have been conducted over said route by United Air Lines, Inc. pursuant to said agreement.

VI

That said route commences at Los Angeles in the State of California and continues via Wilmington-Long Beach in the State of California to the offshore boundary of the State of California, and then continues over the high seas and outside the boundaries and territorial jurisdiction of the State of California for a distance of about twenty-four miles to Avalon on Santa Catalina Island, which is likewise within the State of California.

VII

That the Congress of the United States, by the said Civil Aeronautics Act of 1938 and other Acts, had prior to any of the times referred to in this complaint preempted the entire field of air commerce and air transportation covered by the route of plaintiffs herein described and assumed complete authority to regulate the said route [fol. 4] and to establish the rates and fares thereof and, in this regard, said plaintiffs allege that 49 USCA 171, defines interstate or foreign air commerce to include transportation "* * * *between points within the same state, territory or possession or the District of Columbia, but through the air space Over Any Place Outside Thereof* * * *", and 49 USCA 401, subsec. 20(a) defines interstate, overseas and foreign air commerce to mean the carriage "*by aircraft of persons or property* * * *between places in the same State of the United States through the air*

space Over Any Place Outside Thereof * * *", and 49 USCA 401, subsec. 21(a) defines interstate, overseas and foreign air transportation to mean "*the carriage by aircraft of persons or property* * * * *between places in the same State of the United States through the air space Over Any Place Outside Thereof* * * *." (Emphasis added.)

VIII

That at all times herein mentioned said route and operations thereon were entirely under the control and regulation of the Civil Aeronautics Board, and were not under the jurisdiction or control or regulation of the Public Utilities Commission of the State of California, and under said Civil Aeronautics Act of 1938 (49 USCA Section 403) and the regulations duly promulgated by the Civil Aeronautics Board pursuant thereto, said plaintiffs were and are required to file with the Civil Aeronautics Board tariffs showing the rates, fares and charges for the air transportation in said route, and to post and publish the same in accordance with the regulations of said Board, and at all times herein mentioned said tariffs have been so filed, posted and published, and said plaintiffs were and are prohibited from charging, demanding, collecting or receiving any greater or less or different compensation for said transportation than the rates, fares and charges so filed, posted and published, and at all times herein mentioned all said rates, fares and charges pertaining to said route [fol. 5] have accordingly been filed with the Civil Aeronautics Board, and not with said Public Utilities Commission of the State of California.

IX

That the said Public Utilities Commission now claims and asserts that the said route and operations are entirely under the control and regulation of the said Public Utilities Commission and that all of the rates, fares and charges on said route must be filed with the said Public Utilities Commission, and that the plaintiff United Air Lines, Inc., in failing to so file the same, has violated the provisions of Section 76(a) of the said Public Utilities Act (Section 2107 of the Public Utilities Code), and that said plaintiff has become liable for penalties in the sum of $2000 per

day for every day of such violation. Said Public Utilities Commission and the members thereof have threatened to direct the legal advisers of said Public Utilities Commission to bring suit to recover such claimed penalties unless said tariffs on said route are filed with said Public Utilities Commission, and plaintiffs allege that unless the same are so filed the said Public Utilities Commission and the members thereof will so direct its legal advisers, namely, the defendants Edmund G. Brown, Attorney General of the State of California, Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy and J. Thomason Phelps, to bring such suit or suits.

X

Said plaintiffs allege that the claims and assertions of the said defendants are without foundation, and said plaintiff United Air Lines, Inc. has not incurred any of said alleged penalties: First, because Congress has exercised jurisdiction and control and preempted the entire field of regulation of said route, and said route is in no way subject to the regulation and control of said defendants; and, second, that air carriers are not within the purview [fol. 6] of the provisions of the Public Utilities Act of California imposing said penalties; and, third, if those penalties are in any way applicable they are excessive, unreasonable, arbitrary, and oppressive, and impose an unreasonable burden on commerce, and amount to a taking of the property without due process of law, and constitute deprivation of the equal protection of law—all in violation of the Fourteenth Amendment to the Constitution of the United States.

XI

That plaintiffs have no plain, speedy and efficient remedy in the courts of the State of California, or otherwise than by this action, and in this regard said plaintiffs allege that said Public Utilities Act of California is claimed by defendants to impose on plaintiff United Air Lines, Inc. penalties of $2000 per day for said alleged violations of said Act, and also to impose like penalties on every employee of said plaintiff, and likewise to impose criminal

penalties on said plaintiff and its employees, punishable by fine and imprisonment for said alleged violations, and also to permit the said defendants to stand by for long periods of time during which said penalties would accumulate at the rate of $2000 per day without bringing any suit or proceeding to collect the same until the said penalties might aggregate several million dollars. Said Act further is claimed by the defendants to authorize the said defendants to bring numerous suits for so-called reparations in which said defendants claim that all rates or charges collected by plaintiff United Air Lines, Inc. may be recovered together with interest and, if the violation was willful, with exemplary damages in undefined amounts, notwithstanding the fact that all such rates and charges were fixed in all particulars in accordance with the provisions of the Civil Aeronautics Act. Under the laws of the State of California such action by the Public Utilities Commission shall not be subject to review by any court except [fol. 7] upon the question whether such decision of the Commission will result in confiscation of property.

XII

That said threatened acts of defendants are an interference with and an obstruction to interstate and foreign commerce and with the sovereign power of the Nation to control and regulate those who cross its borders, and the matter in controversy herein arises under the Constitution and Laws of the United States, and this court has jurisdiction thereof under the Commerce Clause (Article I, Section 8, Clause 3), the Common Defense and General Welfare Clause (Article I, Section 8, Clause 1), the United States Air Commerce Act of 1926 (49 USCA Sec. 171 et seq.), the Civil Aeronautics Act of 1938 (49 USCA Sec. 401 et seq.), 28 USCA Sec. 1331, and the treaty making clause (Article II, Section 2, Clause 1). That the matter in controversy herein exceeds the sum or value of $3000, exclusive of interest and costs, and arises under the Constitution and Laws of the United States; and in this regard plaintiffs allege that the value of said certificate of convenience and necessity exceeds the value of $3000, the right to enjoy the said rights under said certificate exceeds

the sum of $3000, the right to operate the said lines free of control of defendants exceeds the sum or value of $3000, and the sum or value of said penalties exceeds the sum or value of $3000, all exclusive of interest and costs.

XIII

That an actual controversy exists herein between the parties, and plaintiffs are entitled to a declaratory judgment in this court, declaring and adjudging that said plaintiffs, with respect to said route, are under the sole jurisdiction and regulation of the Civil Aeronautics Board, and that the United States has preempted the right to regulate the same, and that none of the penalties claimed by the defendants are valid and enforceable.

[fol. 8]

XIV

That plaintiffs are entitled to a writ of injunction issued out of this court enjoining said defendants from bringing any action or proceeding for the collection or payment of any of the penalties claimed by defendants, and unless such injunction is granted said plaintiffs will suffer great and irreparable damage and said defendants will bring a multiplicity of suits, actions and proceedings to enforce said penalties.

XV

That plaintiffs are entitled to a temporary injunction pending the trial of said action, enjoining the defendants from any of the acts aforesaid during the pendency of said action and until the further order of this court.

XVI

That plaintiffs are entitled to a temporary restraining order, restraining the defendants from any of the acts aforesaid until the application for a temporary injunction is heard and passed upon by this court, and said plaintiffs allege that irreparable injury, loss and damage will result to plaintiffs before a notice of application for a temporary injunction can be served and a hearing can be had thereon. In this regard, plaintiffs allege that said defendants will bring a multiplicity of suits, actions and proceedings in

different courts compelling payment of the expense of defending the same.

Wherefore, said plaintiffs pray:

1. That it be adjudged that the United States of America, by its Civil Aeronautics Act and other Acts of Congress, has preempted complete control and regulation of the route described herein, and that the defendants have no control or power of regulation over the same.

[fol. 9] 2. That it be adjudged that none of the penalties claimed by defendants are valid and enforceable.

3. That plaintiffs recover declaratory relief and that a declaratory judgment be entered herein adjudging the rights of the parties as aforesaid.

4. That if any of said penalties otherwise apply or are binding in the premises, it be adjudged that said penalties are excessive, unreasonable, arbitrary and oppressive, and constitute a taking of property without due process of law, and a deprivation of the equal protection of the law—all in violation of the Fourteenth Amendment to the Constitution of the United States.

5. That a writ of injunction issue out of this court enjoining and restraining the defendants from instituting any action or taking any proceeding for the enforcement or collection of any of the penalties claimed by the defendants.

6. That a temporary injunction, pending the trial of said action, enjoining the defendants from any of the acts aforesaid during the pendency of said action and until the further order of this court, be granted to the plaintiffs.

7. That a temporary restraining order, restraining the defendants from any of the acts aforesaid until the application for a temporary injunction is heard and passed upon by this court, be issued out of this court.

8. That plaintiffs recover their costs of suit, and have such other and further relief as may be meet in the premises.

Treadwell & Laughlin, Edward F. Treadwell, Reginald S. Laughlin, Mayer, Meyer, Austrian & Platt, John T. Lorch, Attorneys for Plaintiffs.

[fol. 10] *Duly sworn to by John A. Herlihy. Jurat omitted in printing.*

[fol. 11] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER—filed June 25, 1952

Plaintiffs having filed herein their duly verified complaint against defendants seeking an injunction enjoining defendants from bringing any action or proceeding for the collection or payment of any penalties claimed by defendants from plaintiffs growing out of the failure of said plaintiffs to file with defendants their tariffs in connection with their air route between Los Angeles-Long Beach, Los Angeles County, California, and Avalon on Santa Catalina Island, and over the intervening high seas, [fol. 12] and seeking a temporary injunction pending the trial of said action enjoining the defendants from any of the acts aforesaid during the pendency of said action and until the further order of this court, and seeking a temporary restraining order restraining the defendants from any of the acts aforesaid until the application for a temporary injunction is heard and passed upon by this court, and good cause appearing therefor, and the plaintiffs having given security in the sum of $1000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to be wrongfully enjoined or restrained, the security being in such sum as the court deems proper.

It is ordered that said application for a temporary injunction be and the same hereby is set for hearing on the 2nd day of July, 1952, at the hour of 10:00 o'clock A.M., in the courtroom of The Honorable Louis E. Goodman, District Judge, Post Office Building, City and County of San Francisco, State of California, at which time and place the defendants shall appear and show cause why said temporary injunction should not be granted.

It is further ordered that notice of said hearing shall be given by mailing a copy of this order to the defendants, the Attorney General of the United States, the United States

Attorney for the Northern District of California, and the Governor of the State of California, at least five days before said date of hearing, in accordance with 28 USCA, Section 2284.

It is further ordered that a temporary restraining order is hereby made restraining the defendants from any of the acts aforesaid until the application for a temporary injunction is heard and passed upon by this court.

The reasons for the issuance of said restraining order for the injury which plaintiffs will suffer if said temporary restraining order were not granted, and why such injury [fol. 13] would be irreparable, and why the order was granted without notice, are that unless granted the said defendants will bring numerous suits and proceedings against the plaintiffs and will impose excessive, unreasonable, arbitrary and oppressive penalties on plaintiffs, and impose an unreasonable burden on commerce, and if such proceedings should be instituted plaintiffs would be confronted with a large number of actions in different courts and would be compelled to pay the expense of defending the same. The Court specifically finds, based upon evidence submitted to the Judge to whom this application is presented, namely the verified bill of complaint, that such specified irreparable damage will result if this order is not granted.

Dated this 25th day of June, 1952.

Louis E. Goodman, District Judge.

[fol. 14] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO COMPLAINT—filed June 27, 1952

Now comes the plaintiffs in the above-entitled action and, under their right to amend once as of course, hereby amend Paragraph X of the complaint in the above-entitled action so as to read as follows:

X

Said plaintiffs allege that the claims and assertions [fol. 15] of the said defendants are without foundation, and said plaintiff United Air Lines, Inc. has not incurred any of said alleged penalties: First, because Congress has exercised jurisdiction and control and preempted the entire field of regulation of said route, and said route is in no way subject to the regulation and control of said defendants; and, second, that air carriers are not within the purview of the provisions of the Public Utilities Act of California imposing said penalties; and, third, if those penalties are in any way applicable they are excessive, unreasonable, arbitrary, and oppressive, and impose an unreasonable burden on interstate and foreign commerce, and said penalties and the Acts of the legislature of the State of California imposing the same amount to a taking of property of plaintiffs without due process of law, and constitute a denial to plaintiffs of the equal protection of the laws—all in violation of the Fourteenth Amendment to the Constitution of the United States.

Treadwell & Laughlin, Edward F. Treadwell, Reginald S. Laughlin, Mayer, Meyer, Austrian & Platt, John T. Lorch, Attorneys for Plaintiffs.

PROOF OF SERVICE

(Omitted in printing)

[fol. 16] *Duly sworn to by Edward F. Treadwell. Jurat omitted in printing.*

[fol. 17] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—filed July 2, 1952

The defendants Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell,

Members of and Collectively Constituting the Public Utilities Commission of the State of California, Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public Utilities Commission of the State of California, move the Court as follows:

[fol. 18] 1. To dismiss the action on the ground that the Court lacks jurisdiction of the subject matter of the action for the reason that there exists an adequate remedy in the Courts of the State of California for the purpose of reviewing any action that may be taken by the Public Utilities Commission of the State of California or its attorneys or representatives to enforce any penalties that may be provided by the laws of the State of California, or to enforce compliance with any order of said Public Utilities Commission pertaining to the subject matter of the above-entitled action.

2. To dismiss the action on the ground that the plaintiffs have not exhausted their administrative remedy which is available to them for the purpose of correcting any erroneous order that may be issued by said Public Utilities Commission pertaining to the subject matter of the above-entitled action.

3. To dismiss the action on the ground that the Court lacks jurisdiction of the subject matter of the action for the reason that Congress, in enacting the Civil Aeronautics Act of 1938 (49 U.S.C.A. Sections 401-705) has not so occupied nor preempted the field of jurisdiction over air transportation from a point in a state of the United States over territorial waters to another point in the same state as to preclude the exercise of jurisdiction over such transportation by such state of the United States.

(S.) Everett C. McKeage, J. Thomason Phelps, Attorneys for Defendants Public Utilities Commission of the State of California, Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California, 514 State Building, San Francisco 2, Calif.

[fol. 19] NOTICE OF MOTION

(Omitted in printing)

[fol. 20] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

ORDER DESIGNATING UNITED STATES CIRCUIT JUDGE AND UNITED STATES DISTRICT JUDGES PURSUANT TO SECTION 2284 OF 28 UNITED STATES CODE—filed July 15, 1952

Whereas, in my judgment the public interest so requires, I, pursuant to the provisions of Section 2284, Title 28, United States Code, do hereby designate and appoint the

Honorable William E. Orr, United States Circuit Judge for the Ninth Judicial Circuit, and the

Honorable Edward P. Murphy, United States District Judge for the Northern District of California, to wit with the

Honorable Louis E. Goodman, United States District Judge for the Northern District of California, and to hold the District Court for the Northern District of California and to hear and determine the following cause: United Air Lines, Inc., et al. v. Public Utilities Commission of the State of California, et al., No. 31,638, and all motions and proceedings therein.

Dated at San Francisco, California, this 15th day of July, 1952.

Clifton Mathews, Acting Chief Judge, United States Court of Appeals, Ninth Judicial Circuit.

[fol. 21] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR LEAVE TO INTERVENE—filed August 1, 1952

The Civil Aeronautics Board, an agency of the United States, moves the Court for leave to intervene as a

plaintiff in this action under Rule 24(b) of the Rules of Civil Procedure and to file the annexed complaint in intervention herein, upon the grounds, as fully disclosed by the annexed complaint, that (1) plaintiffs rely for ground of claim upon the provisions of the Civil Aeronautics Act of 1938 (49 U.S.C. 401, *et seq.*) administered by the Board, and upon various orders issued and actions taken by the Board under authority of said Act; and (2) the Board's claim and the principal action herein have questions of law and fact in common.

Chauncey Tramutolo, United States Attorney for the Northern District of California; Charles Elmer Collett, Assistant United States Attorney for the Northern District of California; James E. Kilday, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C.; Emory T. Nunneley, Jr., General Counsel, Civil Aeronautics Board, Washington 25, D. C., Attorneys for the Civil Aeronautics Board.

[fol. 22] NOTICE OF MOTION

(Omitted in printing)

[fol. 23] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS —filed August 8, 1952

I

In support of the first ground for their motion to dismiss, these defendants rely upon a decison of the Supreme Court of the United States in the cases of *Alabama Public Service Commission* v. *Southern Railway*, 341 U.S. 363, 365-366, 95 L. ed. 1016, 1019 and *Alabama Public Service*

Commission v. *Southern Railway*, 341 U.S. 341, 350-351, 95 L. ed. 1002-1009.

[fol. 24] II

In support of the second ground for their motion to dismiss, these defendants submit that the plaintiffs are bound to exhaust the administrative remedies available to them as a condition precedent to seeking judicial relief.

Federal Power Commission v. *Arkansas Power and Light Company*, 330 U.S. 802-803, 91 L. ed. 1261-1262.

Myers v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 50-51, 82 L. ed. 638, 644.

Macauley v. *Waterman S.S. Corporation*, 327 U.S. 540, 544, 90 L. ed. 839, 842.

Rochester Telephone Corporation v. *United States*, 307 U.S. 125, 130, 83 L. ed. 1147, 1152.

To the extent, therefore, if at all, that the complaint in this action seeks injunctive relief against any action that might be taken by the defendant Public Utilities Commission in the exercise of the Commission's administrative powers, as distinguished from the commencement of actions for penalties in the courts of the State of California, the plaintiffs have not exhausted the administrative remedy available to them to correct any error in the exercise of such administrative powers.

So far as penalty actions may be concerned, this Court will take judicial notice of the fact that the Commission has authority to institute penalty actions only in the Superior Court of the State of California. Thus, any penalty action brought will be subject to judicial review at the very outset. It is an elementary rule that penalty statutes, although they impose very heavy penalties, are valid where ample opportunity is provided for judicial review.

Wadley Southern Railway Co. v. *Georgia*, 235 U.S. 651, 667-670, 59 L. ed. 405, 414.

In the *Wadley* case, a penalty statute of the State of [fol. 25] Georgia was involved which assessed a penalty as high as $5,000 a day. The Supreme Court of the United

States held that such statute was valid where full opportunity for judicial review is presented. In that case the penalty was assessed for the violation by the railroad company of an order of the Public Service Commission of the State of Georgia. The Court pointed out that the railroad company had an adequate opportunity to seek judicial review of the order of the Commission, but did not do so. The principle here involved is the same. It would make no difference whether the penalty action be brought for direct violation of the statute or brought for a violation of an order of the Public Utilities Commission which was made pursuant to the statute.

In light of this principle, we point out that it is the rule that a criminal prosecution in a State court will not be restrained by a Federal court because of the claim that such prosecution is unlawful, for the reason that there must be a showing, in addition, that such criminal prosecution will cause *irreparable injury.*

Beal v. *Missouri Pacific Rr. Corporation,* 312 U.S. 45, 49-52, 85 L. ed. 577, 579-580.

Obviously, the filing of a penalty action against these plaintiffs for the air carrier operation herein involved could not result in irreparable injury to these plaintiffs for two reasons: (1) that the courts of the State of California and the Supreme Court of the United States are open to the plaintiffs for review of any claimed infringement of their constitutional rights by the institution against them of a penalty action; and (2) one penalty action filed against the plaintiffs could not constitute irreparable injury. It is only where suits of such great number are to be filed that such action would constitute oppression that irreparable injury may be claimed.

[fol. 26] And finally, on this point we cite the case of *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594, 598-599, 94 L. ed. 1088, 1093, which holds that the action taken by an administrative agency may well result in serious injury to a party, but that fact is not sufficient to justify a court in asserting jurisdiction. The administrative remedies must first be exhausted. But we wish to repeat that so far as penalty actions are concerned, they may be prosecuted

only in the Superior Court of California, where the plaintiffs will have adequate judicial protection. In this connection, the attention of this Court is called to the provisions of Sections 2101-2113 of the Public Utilities Code of California.

III

In support of the third ground of their motion to dismiss, these defendants submit that the Supreme Court of California and the Supreme Court of the United States have recently determined that the Public Utilities Commission of California has jurisdiction over the intrastate rates and charges of air carriers even though such carriers be engaged also in interstate commerce. The holding is that the Federal authority has not occupied the field of intrastate air transportation.

> *United Air Lines, Inc., et al.* (Decision No. 45624 in Case No. 5271, rendered April 24, 1951, by the Public Utilities Commission of the State of California, 50 Cal. P.U.C. 563. Decision of Commission affirmed by California Supreme Court without opinion (37 A.C. 633) and appeal dismissed by Supreme Court of the United States without opinion. (October Term 1951, U.S. No. 464, 96 L. ed. Adv. Ops. 228).)

The denial of review by the California Supreme Court of a decision of the California Public Utilities Commission is, in legal effect, an affirmance of the decision.

> *So. California Edison Company* v. *Railroad Commission*, 6 Cal. (2d) 737, 747; *Napa Valley Electric Company* v. *Railroad Commission*, 251 U.S. 366, 371-373, 64 L. ed. 310, 313; *So. Pac. Co.* v. *Van Hoosear* (Ct. of Appeals, 9th Cir.) 72 Fed. (2d) 903, 905.

[fol. 27] In the Civil Aeronautics Act (49 USCA 401 (21) (a))Congress defined "interstate air transportation" so as to include "the carriage by aircraft of persons or property as a common carrier for compensation or hire . . . in commerce between . . . places in the same State of the United

States through the air space over any place outside thereof."

We understand the reason for this inclusion to be that it was intended to cover situations arising on the Canadian and Mexican borders and where two or more State borders are involved. Obviously, uniformity of regulation would be desirable in such cases. However, the case where neither a foreign State nor two or more States of the Union are involved presents no situation coming within the reason of the rule justifying complete occupation of the field of air transportation by the Federal authority. Where the reason for the rule ceases, so should the rule.

One of the strongest presumptions known to the law is that Federal authority has not superseded State authority because the superseding of State authority by the Federal government strikes at that delicate balance between Federal and State jurisdictions upon which our Federal form of government is based. The superseding of State authority will be declared only where there is no possible doubt as to the clear intent of the Congress to so supersede State authority. Furthermore, it must clearly appear that the Federal invasion of State authority is necessary. Nothing must be left to inference or presumption. A Congressional act, in order to supersede State authority in the intrastate field, must be clear and susceptible of only one interpretation and that is that the clear intent of the Congress is to supersede State authority. (*Palmer* v. *Massachusetts*, 308 U.S. 79, 82-85, 84 L. ed. 93, 96-99; *Yonkers* v. *United States*, 320 U.S. 685, 690-691, 88 L. ed. 400, 403-405; *North Carolina* v. *United States*, 325 U.S. 507, 511, 89 L. ed. [fol. 28] 1760, 1765; *Alabama Public Service Commission* v. *Southern Ry.*, 95 L. ed. (adv. ops.) 708, 711.) Any doubt that may exist as to the superseding of State jurisdiction must be resolved in favor of State authority. (*Arkansas R.R. Commission* v. *Chicago, Rock Island & Pac. R.R. Co.*, 274 U.S. 597, 603, 71 L. ed. 1224, 1228.)

A reading of the Civil Aeronautics Act clearly shows that the Congress did not occupy the intrastate field of air transportation and had no intention of doing so so far as eco-

nomic regulation of air carriers is concerned. That Act makes no attempt to regulate rates and charges of air carriers in intrastate commerce. Some confusion arises because the Act apparently attempts to completely occupy the intrastate field from the standpoint of safety of operations of air carriers. But the Congress was meticulously careful to exempt economic regulation of intrastate air transportation from Federal regulation.

The legal rule concerning occupation of field of regulation by the Federal authority as applied to intrastate commerce applies equally to a situation involving intrastate commerce of a local nature where the Federal authority has not occupied completely the interstate field in question. The Supreme Court of the United States has pointed out on many occasions that, as applied to interstate commerce of a local nature, State jurisdiction thereover will not be held to have been superseded by the Federal authority unless the action of the Congress is clear and unmistakable and is irreconcilable with the exercise of State authority. (*Kelly* v. *Washington*, 302 U.S. 1, 9-15, 82 L. ed. 3, 10-13.)

The Supreme Court of the United States has further held that "In the absence of Federal regulation, State regulation is required in the public interest." (*Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329, 333, 95 L. ed. (adv. ops.) 673, 676.)

[fol. 29] In the case of *Fisheries Case* (*United Kingdom* v. *Norway*), Judgment of December 18, 1951, International Court of Justice Reports 1951, p. 116, involving a dispute between Great Britain and Norway concerning the territorial waters of the latter, it was held by the International Court of Justice that waters lying between the mainland of Norway and the chain of islands screening its western shoreline are territorial waters. The principle of this case compels the conclusion that the territory between the California coast and Catalina Island belongs to the United States and does not belong to a State other than California. It follows that, for internal and domestic purposes, this territory is within the jurisdiction of the State of California. At least it cannot be said to be outside the State of California.

The Supreme Court of the United States has held that the operation of a common carrier vessel between San Pedro, California, and Catalina Island is a matter of such local nature that the Public Utilities Commission of California has jurisdiction thereover.

Wilmington Transportation Co. v. *Railroad Commission*, 236 U.S. 151, 156, 59 L. ed. 508, 517.

The Court pointed out that Catalina Island is a part of California and is a part of no other State. While it is true that the decision makes some reference to the high seas, the question decided was that such operation is one of a local nature peculiarly within the jurisdiction of the State of California. If that particular field of operation, lawfully, may be occupied by the Federal government, we point out that, under the authorities heretofore cited, the act of the Congress undertaking to occupy the field in question must be clear and unambiguous and susceptible of no other interpretation than that State regulation is ir-
[fol. 30] reconcilable with the exercise of Federal authority.

Respectfully submitted, (S.) Everett C. McKeage, J. Thomason Phelps, Attorneys for Defendants Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California, 514 State Building, San Francisco 2, Calif.

Dated: August 6, 1952.

[fol. 31] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION TO DISMISS AND OTHER ORDERS—filed August 12, 1952

The motion of the defendant Public Utilities Commission of the State of California, and its Members, to dismiss the cause is denied.

The motion of defendant Edmond G. Brown, Attorney General of the State of California, to dismiss the action as to him is granted.

The petition of the Civil Aeronautics Board to intervene is granted, and the Intervener's complaint, tendered with its motion, is ordered filed herein.

Defendants are allowed ten (10) days from date hereof in which to answer the complaints.

Inasmuch as counsel have stipulated that the cause may be heard upon its merits rather than upon the application [fol. 32] for *for* preliminary injunction, the cause is set for hearing on the merits on Friday, August 29, 1952 at 10 a.m. The temporary restraining order heretofore issued will continue in effect until decision is rendered on the merits.

Dated: August 12, 1952.

Wm. E. Orr, United States Circuit Judge; Louis E. Goodman, United States District Judge; Edward P. Murphy, United States District Judge.

[fol. 33] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 31638

UNITED AIR LINES, INC., a corporation; and CATALINA AIR TRANSPORT, a corporation, Plaintiffs,

CIVIL AERONAUTICS BOARD, Intervenor,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Edmund G. Brown, Attorney General of the State of California; Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public Utilities Commission of the State of California, Defendants

INTERVENOR'S COMPLAINT—Filed August 13, 1952

For its complaint in intervention the Civil Aeronautics Board alleges as follows:

I

The plaintiffs are common carriers engaged in the transportation of persons and property by aircraft from the mainland of the State of California (Los Angeles-Wilmington-Long Beach) to Avalon, Santa Catalina Island, California, under authority of a certificate of public convenience and necessity issued by the Civil Aeronautics Board pursuant to the provisions of the Civil Aeronautics Act of 1938. Plaintiffs, in reliance upon the provisions of the Civil [fol. 34] Aeronautics Act, the aforesaid certificate and other orders issued and actions taken by the Board under said Act, request, among other things, declaratory and injunctive relief against threats by the defendant Public Utilities Commission of the State of California and its

members to cause the defendant legal advisers of the Commission to bring suit against the plaintiffs for the recovery of penalties alleged to be due under the laws of the State of California by reason of plaintiffs' failure to file tariffs with the Commission for operations between the mainland of California and Santa Catalina Island, and further request declaratory and injunctive relief against any and all other attempts by the defendants to regulate such operations.

II

This action arises under an act of the Congress of the United States regulating commerce (Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U.S.C. 401, *et seq.*) as to which this Court has jurisdiction under 28 U.S.C. 1337, and under the Constitution and laws of the United States as to which this Court has jurisdiction under 28 U.S.C. 1331. The Court also has jurisdiction of intervenor's claim under 28 U.S.C. 1345.

III

The Civil Aeronautics Board is an agency of the United States created by and charged with responsibility, among other things, for the administration and enforcement of the economic regulatory provisions of the Civil Aeronautics Act of 1938. That Act provides for detailed and comprehensive regulation by the Board of air transportation as defined therein, and of air carriers engaged in such air transportation. The Board is empowered to issue certificates of public convenience and necessity authorizing air carriers to engage, *inter alia*, in interstate air transporta- [fol. 35] tion (49 U.S.C. 401(2), 401(21), 481). Tariffs for such interstate air transportation must be filed with the Board and observed by air carriers (49 U.S.C. 483), and rates and practices in interstate air transportation may be prescribed by the Board (49 U.S.C. 484, 491, 642). Service may be suspended or terminated only by leave of the Board (49 U.S.C. 481(k)), and adequate service may be compelled of air carriers with respect to interstate air transportation (49 U.S.C. 484, 642). Contracts between carriers relating to interstate air transportation must be

filed with the Board for its approval or disapproval (49 U.S.C. 488, 492). Interstate air transportation is defined by the Civil Aeronautics Act to include, among other things, "the carriage by aircraft of persons or property as a common carrier for compensation or hire * * * in commerce between * * * places in the same State of the United States through the air space over any place outside thereof" (49 U.S.C. 401(21) (a)).

IV

Santa Catalina Island, a part of the State of California, is located approximately 30 miles from the mainland of California along the route operated by the plaintiffs, and approximately 22 miles from the nearest portion of the mainland. Plaintiffs' common carrier operations by aircraft between the mainland of California and Santa Catalina Island require flights of aircraft over waters which are outside of the boundaries and territorial jurisdiction of the State of California, and such operations constitute interstate air transportation as defined by the Civil Aeronautics Act.

V

Pursuant to and in accordance with the provisions of the Civil Aeronautics Act, the Civil Aeronautics Board on October 13, 1939 issued to the plaintiff Catalina Air Transport a certificate of public convenience and necessity which, as amended, authorizes that carrier to engage in the air [fol. 36] transportation of persons and property between Los Angeles, California and Avalon, Santa Catalina Island, California, via the intermediate point Wilmington-Long Beach, subject to the restriction that persons and property be transported between Los Angeles and Long Beach only on through flights to and from Avalon (1 Civil Aeronautics Authority Reports 431 (1939), 2 Civil Aeronautics Board Reports 798 (1941)). On July 23, 1942, the Board authorized a suspension of operations which continued for the duration of World War II (see 6 Civil Aeronautics Board Reports 1041, 1043 (1946)). Thereafter, on June 3, 1946, the Board approved a contract between the plaintiffs whereby United Air Lines was and is authorized to operate

the route on behalf of Catalina Air Transport (*ibid*). During all periods of operations, tariffs and other required documents and reports have been filed with the Board, and operations have been conducted under the regulatory supervision and jurisdiction of the Board.

VI

Upon information and belief, the defendant Public Utilities Commission of the State of California and its members have informed the plaintiffs that their said route and operations between Santa Catalina Island and the mainland of California are entirely within the regulatory control and jurisdiction of the said Commission; and that all rates, fares, and charges therefor must be filed with the Commission; and have threatened to direct the defendant legal advisers of said Commission to bring suit to recover penalties for the failure of the plaintiffs to file tariffs with the Commission and otherwise intend by the institution of proceedings before the Commission and the Courts to undertake to exercise regulatory control over said route and operations.

[fol. 37]

VII

The provisions of the Civil Aeronautics Act heretofore cited confer exclusive regulatory jurisdiction in the Civil Aeronautics Board over the plaintiffs' operations between Santa Catalina Island and the mainland of California, and the Board has exercised and is exercising such exclusive jurisdiction. The attempts by the defendants to assume regulatory control over said operations constitute an unlawful interference with interstate commerce and unlawfully interfere with the jurisdiction and functions of the Civil Aeronautics Board.

Wherefore, the Civil Aeronautics Board prays:

1. That it be adjudged and declared that the United States, by the Civil Aeronautics Act and by the actions of the Civil Aeronautics Board thereunder, has assumed complete control and regulation of the plaintiffs' route and operations between Santa Catalina Island and the mainland

of California and that defendants have no control or power of regulation over said route and operations;

2. That a writ of injunction issue out of this Court enjoining and restraining defendants from instituting any action or proceeding for the enforcement or collection of any penalties against the plaintiffs or otherwise for the purpose of asserting regulatory control over the plaintiffs in the conduct of their operations over the route described;

3. That a temporary injunction be granted enjoining defendants from any of the acts aforesaid during the [fol. 38] pendency of this action and until the further order of the Court; and

4. That the Court grant such other and further relief as may appear just and proper in the circumstances.

Chauncey Tramutolo, United States Attorney for the Northern District of California; Charles Elmer Collett, Assistant United States Attorney for the Northern District of California; James E. Kilday, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C.; Emory T. Nunneley, Jr., General Counsel, Civil Aeronautics Board, Washington 25, D. C., Attorneys for the Civil Aeronautics Board.

[fol. 39] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANTS PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, AND PETER E. MITCHELL, MEMBERS OF AND COLLECTIVELY CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; EVERETT C. MCKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY AND J. THOMASON PHELPS—filed August 22, 1952

[fol. 46] The above-named defendants (hereinafter called "defendants") hereby answer plaintiffs' amended Complaint as follows:

I

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph I of the Complaint.

II

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph II of the Complaint.

III

Defendants admit the allegations contained in Paragraph III of the Complaint.

IV

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IV of the Complaint.

V

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V, except that defendants are informed and believe that plaintiff United Air Lines, Inc., has conducted operations between Los Angeles, in the State of California, and Avalon, Santa Catalina Island, in the State of California, via Wilmington-Long Beach, in the State of California.

VI

Defendants admit that "said route commences at Los Angeles, in the State of California, and continues via Wilmington-Long Beach, in the State of California", deny that said route continues "to the offshore boundary of the State of California", deny that said route "continues over the high seas and outside the boundaries and territorial jurisdiction of the State of California for a distance of about twenty-four miles", and admit [fol. 41] that said route terminates at "Avalon on Santa Catalina Island, which is likewise within the State of California".

Further answering Paragraph VI of the Complaint, defendants allege, upon information and belief, that the distance between the mainland of California and the shores of Santa Catalina Island is approximately thirty miles.

VII

Defendants make no answer to the conclusions of law set out in Paragraph VII of the Complaint, deeming that no answer thereto in a pleading is necessary.

VIII

Defendants make no answer to the conclusions of law contained in Paragraph VIII of the Complaint, deeming that no answer thereto in a pleading is necessary.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that "at all times herein mentioned said tariffs have been so filed, posted and published", appearing at lines 26-28 of page 4 of the Complaint, and the allegation that "at all times herein mentioned all said rates, fares and charges pertaining to said route have accordingly been filed with the Civil Aeronautics Board", commencing at line 31 of page 4 of the Complaint and terminating on line 2 of page 5 thereof.

Defendants admit that no rates, fares or charges pertaining to said route have been filed with the defendant Public Utilities Commission of the State of California.

IX

Defendants admit the allegation that "the said Public Utilities Commission now claims and asserts" that "all of the rates, fares and charges on said route must be filed with the said Public Utilities Commission", and deny the other allegations contained in Paragraph IX of the Complaint.

[fol. 42]

X

Defendants make no answer to the conclusions of law contained in Paragraph X of the Complaint, as amended, deeming that no answer thereto in a pleading is necessary,

and deny that any of the defendants have made any "claims and assertions" of the kind referred to in said Paragraph X, except the claim and assertion alleged in Paragraph IX of the Complaint and admitted in Paragraph IX hereof.

XI

Defendants deny the allegations of fact contained in Paragraph XI of the Complaint, and make no answer to the conclusions of law contained therein, deeming that no answer thereto in a pleading is necessary.

XII

Defendants make no answer to the conclusions of law contained in Paragraph XII of the Complaint, deeming that no answer thereto in a pleading is necessary.

Defendants deny that any of them have "threatened acts" of any of the kinds described in the Complaint.

Defendants deny that any such acts "are an interference with and an obstruction to interstate and foreign commerce, and with the sovereign power of the Nation to control and regulate those who cross its borders."

Defendants deny that there is any "matter in controversy herein."

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that any such matter "exceeds the sum or value of $3,000, exclusive of interest and costs", the allegation that "the value of said certificate of convenience and necessity exceeds the value of $3,000", the allegation that "the right to enjoy the said rights under said certificate exceeds the sum of $3,000", the allegation that "the right to operate the said lines free of control of defendants exceeds the sum or value of $3,000", the allegation that "the sum or value of said penalties exceeds the sum or value of $3,000", and the allegation that said sums are "all exclusive of interest and costs."

[fol. 43] XIII

Defendants make no answer to the conclusions of law set out in Paragraph XIII of the Complaint, deeming that

no answer thereto in a pleading is necessary, and deny the allegations of fact contained in said paragraph.

XIV

Defendants make no answer to the conclusions of law set out in Paragraph XIV of the Complaint, deeming that no answer thereto in a pleading is necessary, and deny the allegations of fact contained in said paragraph.

XV

Defendants make no answer to the conclusions of law contained in Paragraph XV of the Complaint, deeming that no answer thereto in a pleading is necessary, and deny any allegation of fact contained in said paragraph.

XVI

Defendants make no answer to the conclusions of law contained in Paragraph XVI of the Complaint, deeming that no answer thereto in a pleading is necessary, and deny the allegations of fact contained in said paragraph.

Wherefore, defendants pray:

1. That the Court dismiss the Complaint, as amended, and render its judgment for the defendants.
2. That the Court award to the defendants their costs.

(S.) Everett C. McKeage, J. Thomason Phelps, Attorneys for Defendants Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public Utilities Commission of the State of California.

[fol. 44] AFFIDAVIT OF SERVICE BY MAIL

(Omitted in printing)

[fol. 45] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT PUBLIC UTILITIES COMMISSION AND OTHERS TO INTERVENOR'S COMPLAINT—filed October 17, 1952

The defendants Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Everett C. Mc-[fol. 46] Keage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps (hereinafter called defendants) hereby answer the intervenor's complaint as follows:

I

Answering paragraph I of the intervenor's complaint, the defendants admit that "the plaintiffs are common carriers engaged in the transportation of persons and property by aircraft from the mainland of the State of California (Los Angeles-Wilmington-Long Beach) to Avalon, Santa Catalina Island, California."

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that such transportation is performed "under authority of a certificate of public convenience and necessity issued by the Civil Aeronautics Board pursuant to the Civil Aeronautics Act of 1938."

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that the plaintiffs rely upon certain alleged provisions of law, but admit that the plaintiffs request relief of the kind alleged in paragraph I of intervenor's complaint against alleged threats of the kind alleged in said paragraph. Defendants deny the making of any such threats by them or by any of them.

II

Defendants make no answer to the conclusions of law set out in paragraph II of the intervenor's complaint, deeming that no answer thereto in a pleading is necessary.

III

Defendants are informed and believe and therefore admit that the Civil Aeronautics Board is an agency of the United States created by the Civil Aeronautics Act of 1938.

Defendants make no answer to the conclusions of law set out in Paragraph III of the intervenor's complaint, deem-
[fol. 47] ing that no answer thereto in a pleading is necessary.

IV

Defendants admit that Santa Catalina Island is a part of the State of California. Defendants are informed and believe and therefore admit that Santa Catalina Island is located approximately 30 miles from the mainland of California. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that such distance is "along the route operated by plaintiffs" and the allegation that Santa Catalina Island is located "approximately 22 miles from the nearest portion of the mainland."

Defendants admit that "plaintiffs' common carrier operations by aircraft between the mainland of California and Santa Catalina Island require flights of aircraft over waters," but deny that such waters "are outside of the boundaries and territorial jurisdiction of the State of California."

Defendants make no answer to the conclusion of law in paragraph IV of the intervenor's complaint that "such operations constitute interstate air transportation as defined by the Civil Aeronautics Act," deeming that no answer thereto in a pleading is necessary.

V

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V of intervenor's complaint.

VI

Defendants deny that "the defendant Public Utilities Commission of the State of California and its members have informed the plaintiffs that their said route and operations between Santa Catalina Island and the mainland of California are entirely within the regulatory control and jurisdiction of the said Commission," but admit that said Commission has informed the plain- [fol. 48] tiffs that "all rates, fares, and charges" for such transportation between Santa Catalina Island and the mainland of California "must be filed with said Commission."

Defendants deny that they or any of them "have threatened to direct the defendant legal advisors of said Commission to bring suit to recover penalties for the failure of the plaintiffs to file tariffs with the Commission," and deny that the defendants or any of them "intend, by the institution of proceedings before the Commission and the Courts, to undertake to exercise regulatory control over said route and operations," except such control over the rates and charges pertaining to said route and operations as may be finally determined to be justified after formal proceedings commenced by an order of the Commission instituting investigation into said route and operations.

VII

Defendants make no answer to the conclusions of law contained in paragraph VII of the intervenor's complaint, deeming that no answer thereto in a pleading is necessary, and deny that the defendants or any of them have attempted "to assume regulatory control over said operations."

Wherefore, defendants pray:

1) That the Court dismiss the intervenor's complaint and render its judgment for the defendants.

2) That the Court award costs to the defendants against the intervenor.

(S.) Everett C. McKeage, J. Thomason Phelps, Attorneys for Defendants Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps.

[fols. 49-50] AFFIDAVIT OF SERVICE BY MAIL

(Omitted in printing)

[fol. 51] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AGREED STATEMENT OF FACTS—filed November 21, 1952

In order to simplify the trial of the above-entitled action, and in order to lighten the burden of the Court, this stipulation is entered into in view of the approaching trial of the case on August 29, 1952, and the facts herein recited and set forth shall be deemed to be true, and shall stand in the [fol. 52] place of formal testimony and evidence:

1. That the plaintiff Catalina Air Transport is, and at all times mentioned in the complaint was, a corporation organized and incorporated under the laws of the State of California.

2. That the plaintiff United Air Lines, Inc. is, and at all

times mentioned in the complaint was, a corporation organized and incorporated under the laws of the State of Delaware and is a citizen resident of the State of Delaware.

3. Prior to October 13, 1939, Wilmington-Catalina Airline, Ltd. made an application to the Civil Aeronautics Authority for a Certificate of Public Convenience and Necessity with respect to the line described in the complaint, under the provisions of Section 401(e)(1) of the Civil Aeronautics Act of 1938.

4. On October 13, 1939, the Civil Aeronautics Authority made its order approving said petition and granting to said Wilmington-Catalina Airline, Ltd. a Certificate of Public Convenience and Necessity under said Act. Said order and opinion supporting it are published in 1 Civil Aeronautics Authority Reports, page 431. The Court may take judicial notice of said opinion and order without having a copy attached hereto.

5. Thereafter said Wilmington-Catalina Airline, Ltd. duly took such proceedings as were necessary to change its name to Catalina Air Transport. This change of name is shown in 2 Civil Aeronautics Board Reports, page 798. The Court may take judicial notice thereof without the same being attached hereto.

6. Thereafter, and on March 7, 1946, a contract in writing was entered into between the said Catalina Air Transport and United Air Lines, Inc. for the operation of said line by United Air Lines, Inc. Thereupon said United Air Lines, Inc. and Catalina Air Transport made an application to the Civil Aeronautics Board, under Sections 408(b) and 412(b) of said Civil Aeronautics [fol. 53] Act; and thereupon, on June 3, 1946, said Civil Aeronautics Board made its opinion and order approving said agreement on the condition that the supplemental oral agreement on passenger and air express rates entered into by Catalina and United shall be reduced to writing and filed with the Board for approval, under Section 412 of the Act, within 30 days of the approval of said order, and that this approval shall not extend to any other supplemental agreements which may hereafter be entered into pursuant to the terms of the two agreements approved. This opinion

and order are reported in 6 Civil Aeronautics Board Reports, page 1041. Said supplemental agreement was duly filed in accordance with said order.

7. None of the rates established by Catalina or United with respect to said route were ever filed with or approved by the Public Utilities Commission of the State of California.

8. In the year 1951 there was an exchange of correspondence over the question of the jurisdiction of said Commission and the duty of United to file its tariffs with said Commission, and the following letters were exchanged between representatives of United Air Lines, Inc. and the Public Utilities Commission, said letters being dated, respectively, August 6, 1951, September 10, 1951, September 20, 1951, October 11, 1951, November 6, 1951, November 30, 1951, December 5, 1951, and December 27, 1951. Copies of said letters are attached hereto, as Exhibit A, and made a part hereof.

9. The Commission now claims and asserts, and from time to time in the past has asserted that the said rates, fares and charges are entirely under the control and regulation of the said Public Utilities Commission, and that all of the rates, fares and charges on said route must be filed with the said Commission.

9A. The Public Utilities Commission asserts jurisdiction only over intrastate air transportation, and in this respect said Public Utilities Commission claims that the route between Wilmington, Calif. and Avalon on Santa Catalina Island, Calif. is an intrastate route.

10. Copies of certain of the documents referred to in [fol. 54] this stipulation may be attached hereto and if so attached shall be made a part of this stipulation and agreed statement.

11. It is further stipulated that the distance between the shoreline of the United States mainland and Santa Catalina Island is substantially 30 miles.

12. It is further stipulated that in agreeing to this statement of facts the parties do not waive the right to introduce testimony at the time of the hearing respecting mat-

ters not covered by said statement, or to supplement the facts therein stated.

Treadwell & Laughlin, Edward F. Treadwell, Reginald S. Laughlin, Mayer, Meyer, Austrian & Platt, John T. Lorch, Attorneys for Plaintiffs.

Everett C. McKeage, J. Thomason Phelps, Attorneys for Defendants.

We hereby approve and join in the foregoing statement of facts.

Chauncey Tramutolo, United States Attorney; Charles R. Collett, Asst. United States Attorney; Emory T. Nunneley, Jr., General Counsel, Civil Aeronautics Board; O. D. Ozment, Attorney, Civil Aeronautics Board, Attorneys for the Civil Aeronautics Board.

[fol. 55] EXHIBITS A-1 THRU 10 TO AGREED STATEMENT OF FACTS

EXHIBIT A-1

Commissioners

Richard E. Mittelstaedt, President
Justus F. Craemer
Harold P. Huls
Kenneth Potter
Peter E. Mitchell

PUBLIC UTILITIES COMMISSION

State of California, August 6, 1951

California State Building, San Francisco 2, Calif.

Address All Communications to the Commission.

File No. 360-1.

Mr. W. Delaney Dilworth,
Traffic Manager,
United Air Lines, Inc.,
5959 South Cicero Avenue,
Chicago 38, Illinois.

Dear Mr. Dilworth:

We understand that the United Air Lines, Inc., is providing passenger transportation service by air for the pub-

lic generally between Long Beach and Avalon, Santa Catalina Island.

A review of our official files fails to indicate that the United Air Lines have a tariff on file with this Commission which sets forth the fares, rules and charges applicable to the aforementioned California intrastate traffic.

It is requested that you inform this office as to what action United Air Lines contemplates taking in this matter.

Yours very truly, (Sgd.) Warren K. Brown, Director of Transportation.

[fol. 56] EXHIBIT A-2

Letterhead of

UNITED AIR LINES

September 10, 1951

Mr. Warren K. Brown,
Director of Transportation,
Public Utilities Commission of
the State of California,

California State Building,
San Francisco 2, California.

Re: Your File No. 360-1

Dear Mr. Brown:

Thank you for your kind consideration in sending to me a copy of your letter of August 6, 1951.

With particular reference to that letter, United Air Lines, Inc. is providing air transportation for the carriage of persons and property between Los Angeles and Avalon and also between Long Beach and Avalon, in both directions.

We have on file with the Civil Aeronautics Board our tariffs covering the fares, rates and charges applicable to this service. Inasmuch as the Public Utilities Com-

mission of the State of California does not have jurisdiction over the regulation of this service, we have not filed a tariff with your Commission.

Very truly yours, W. Delaney Dilworth, Traffic Manager.

pss:ab.

cc: John T. Lorch, Esq., Oscar A. Trippett, Esq., Charles Stearns, Esq., Paul Hebard—EXORD.

[fol. 57] EXHIBIT A-3

Commissioners

Richard E. Mittelstaedt, President
Justus F. Craemer
Harold P. Huls
Kenneth Potter
Peter E. Mitchell

PUBLIC UTILITIES COMMISSION

State of California, September 20, 1951

California State Building, San Francisco 2, Calif.

File No. 360-1

Address All Communications to the Commission.
Mr. W. Delaney Dillworth,

Traffic Manager,
United Air Lines, Inc.
5959 South Cicero Avenue,
Chicago, Illinois.

Dear Mr. Dillworth:

It has been brought to the attention of this Commission that United Air Lines is performing air transportation between Los Angeles, California, and Avalon, on Santa Catalina Island, and also between Long Beach, California, and Avalon, without having filed with this Commission its

tariffs covering such transportation. It is our understanding that this operation is intrastate.

In your letter of September 10, 1951, to Mr. Brown, Director of Transportation of this Commission, you take the position that the Public Utilities Commission of California does not have jurisdiction over the service in question.

This is to inform you that this Commission does have jurisdiction over the service in question, it being intrastate, and the Supreme Court of this State has held that such service is subject to the jurisdiction of this Commission. Therefore, you are instructed to file with this Commission the tariffs covering the service in question.

Very truly yours, (Sgd.) R. J. Pajalich, Secretary.

[fol. 58] EXHIBIT A-4

Letterhead of

UNITED AIR LINES

October 11, 1951

Mr. R. J. Pajalich, Secretary,
Public Utilities Commission of
the State of California,

California State Building,
San Francisco 2, California.
Subject: Letter of September 20, 1951. File No. 360-1.

Dear Mr. Pajalich:

The matter of filing a tariff for our Catalina service with the Public Utilities Commission for the State of California was referred to our Law Department for their review. We have just been advised that their opinion will be available this week, and we plan to communicate with you as quickly as it is received.

Very truly yours, W. Delaney Dilworth, Traffic Manager.

LGB:hk.

[fol. 59] EXHIBIT A-5

Commissioners

Richard E. Mittelstaedt, President
Justus F. Craemer
Harold P. Huls
Kenneth Potter
Peter E. Mitchell

PUBLIC UTILITIES COMMISSION

State of California, November 6, 1951

California State Building, San Francisco 2, Calif.

File No. 360-1

Address All Communications to the Commission.

Dear Mr. Dillworth:
Traffic Manager,
United Air Lines, Inc.,
5959 South Cicero Avenue,
Chicago 38, Illinois.

Dear Mr. Dillworth:

This refers to our exchange of letters regarding the filing of a tariff covering your service to Santa Catalina Island. Under date of October 11 you wrote us to the effect that the opinion of your law department in this matter would be available that week and you would communicate with us when it was received.

Can you now inform us what position you propose taking in this matter?

Yours very truly, (Sgd.) Warren K. Brown, Director of Transportation.

[fol. 60] EXHIBIT A-6

November 30, 1951.

Mr. Warren K. Brown,
Director of Transportation,
Public Utilities Commission,
State of California,
California State Building,
San Francisco 2, California.

Re: File No. 360-1

Dear Mr. Brown:

This will acknowledge receipt of your letter of November 6, 1951, regarding our service to Santa Catalina Island.

This matter is now in the hands of our local counsel in Los Angeles and you will hear from them within the next few days.

Yours very truly, W. D. Dilworth, Traffic Manager.

THD:ru.

[fol. 61] EXHIBIT A-7 & 8

TRIPPET, NEWCOMER, YOAKUM & THOMAS

Lawyers

458 South Spring Street

Los Angeles 13, 5 December 1951

Air Mail

Wilson E. Cline, Esq.,
Assistant Counsel,
Public Utilities Commission,
State of California,
California State Building,
San Francisco 2, California.

Re: File No. 360-1 (United Air Lines, Inc.)

Dear Mr. Cline:

You probably are aware of the fact that rather extended correspondence has been exchanged between the Public

Utilities Commission and United with respect to that carrier's operation between Santa Catalina Island and the Los Angeles area. Such correspondence has been handled by Messrs. Brown and Pajalich on behalf of the Commission, and personnel in United's general office in Chicago. The question involved is whether or not United is required to file with your Commission tariffs covering the Catalina operation.

The matter has now been referred to us by our client for further handling, and since it concerns a question of law, it seemed appropriate to me that I should address this communication to you.

It is our position, of course, that United is not subject to the jurisdiction of your Commission with respect to transportation furnished by it between Catalina and the mainland, for all of the reasons which we have heretofore advanced in connection with the Los Angeles-San Francisco air coach fare matter now on appeal to the Supreme Court of the United States. There is present in the Catalina situation an additional factor which, in our opinion, serves to remove any possible doubt with respect to the [fol. 62] question. This is the fact that, while the termini of the route; i.e., Avalon and Long Beach-Los Angeles, are within the State of California, all but a small portion of the route traverses the high seas, an area which lies without the boundaries of the State of California (California Constitution Article XXI). Under such circumstance, the express language of the Civil Aeronautics Act establishes the fact of exclusive federal occupancy of the field of regulation (49 U.S.C. 401 (10), (20) and (21)). Ipso facto, this precludes the exercise of control by the State.

I trust that you will agree with the position taken by us, so that the problem may thereby be disposed of. In any event, I shall be pleased to hear from you on the matter.

Yours very truly, —— ——, of Trippet, Newcomer, Yoakum & Thomas.

CS/rg.

[fol. 63] EXHIBIT A-9 & 10

(Seal)

PUBLIC UTILITIES COMMISSION

State of California

California State Building, San Francisco 2, Calif.

December 27, 1951

File No. 360-1

Address all Communications to the Commission.

Mr. Charles Stearns, Esq.,
Trippet, Newcomer, Yoakum & Thomas,
458 South Spring Street,
Los Angeles, California.

Re: File No. 360-1 (United Air Lines, Inc.)

Dear Mr. Stearns:

Your letter of December 5 to Mr. Cline has been referred to this office for reply.

You, of course, are fully aware of the position which has been taken by the Commission with respect to intrastate fares of air carriers operating within the State of California, which position is now supported by decisions of the California Supreme Court.

You now contend that the route between Avalon and Long Beach-Los Angeles traverses the high seas and that state regulation is precluded by reason of the claimed exclusive Federal occupancy of this field of regulation. We have given the sections of the Civil Aeronautics Act to which you have referred us careful consideration. 49 U.S.C. 401 (20) is not applicable as it relates to "air commerce". We interpret 49 U.S.C. 401 (21) to define "interstate air transportation", "overseas air transportation", and "foreign air transportation" separately and not jointly.

Interstate air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage

of mail by aircraft in commerce between a place in any state of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or *between places in the same State of the United States through the air space over any place outside thereof;* or between places in the same Territory or possession of the United States, or the District of Columbia.

Overseas air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage of mail by aircraft in commerce between a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or posses- [fol. 64] sion of the United States, and a place in any other Territory or possession of the United States.

Foreign air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage of mail by aircraft in commerce between a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

The transportation of persons or property by air carrier between Avalon and Long Beach-Los Angeles is not interstate or foreign commerce in the general sense or in the Constitutional sense. See *Wilmington Transportation Company* v. *Railroad Commission,* (1913), 166 Cal. 741, affirmed (1915), 263 U S 151, 56 L. ed 508. Conceding for the sake of argument that such transportation is overseas transportation in the general sense, Congress has not seen fit to include such transportation within its own definition of "overseas air transportation." The language "or between places in the same State of the United States through the air space over any place outside thereof" as used in the definition of "interstate air transportation" undoubtedly applies to transportation between places in the same state where the aircraft has gone through the air space over some other state. Hence, the Congress has not occupied the field in so far as the local transportation by aircraft between Avalon and Long Beach-Los Angeles is concerned, and such transportation remains

subject to regulation pursuant to the applicable provisions of the California Constitution.

In view of our interpretation of the Civil Aeronautics Act and the California Constitution we again instruct your client United Air Lines, Inc., to file with this Commission the tariffs covering the service between Avalon and Long Beach-Los Angeles.

Very truly yours, (S.) R. J. Pajalich, Secretary.

[fol. 65] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31638

UNITED AIR LINES, INC., a corporation; and CATALINA AIR TRANSPORT, a corporation, Plaintiffs,

CIVIL AERONAUTICS BOARD, Intervenor,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al., Defendants

Treadwell & Laughlin, Edward F. Treadwell, Reginald S. Laughlin, 955 Mills Tower, San Francisco 4, Calif.; Mayer, Meyer, Austrian & Platt, John T. Lorch, 231 South LaSalle Street, Chicago 4, Illinois, Attorneys for Plaintiff.

Chauncey Tramutolo, United States Attorney; Charles Elmer Collett, Assistant United States Attorney, San Francisco, Calif.; James E. Kilday, Special Assistant to the Attorney General, Washington 25, D.C.; Emory T. Nunneley, Jr., General Counsel, Civil Aeronautics Board, Washington 25, D. C., Attorneys for Intervenor.

O. C. Ozment, Assistant to General Counsel, Civil Aeronautics Board.

Everett C. McKeage, Chief Counsel Public Utilities Commission, 514 State Building, San Francisco, Calif.; J. Thomason Phelps, 514 State Building, San Francisco, Calif., Attorneys for Defendants.

[fol. 66] Before: ORR, Circuit Judge; GOODMAN, District Judge; MURPHY, District Judge.

OPINION—Filed December 3, 1952

GOODMAN, District Judge:

On October 13, 1939, the Civil Aeronautics Board, pursuant to its power under the Civil Aeronautics Act (49 USC 401 et seq.), issued to the plaintiff, Catalina Air Transport, a certificate of public convenience and necessity authorizing it to engage in air transportation between Los Angeles-Wilmington-Long Beach, California, and Avalon on the island of Santa Catalina, (a part of the State of California) over the intervening high seas. Since March 7, 1946, plaintiff, United, with the approval of the Civil Aeronautics Board, has conducted air transportation over the described route and has performed the obligations of plaintiff, Catalina, under the latter's certificate of convenience and necessity. Plaintiff, Catalina, since 1939, and United, since 1946, have been subject, in all respects, including rates of transportation, to the regulations of the Civil Aeronautics Board. In September of 1951, defendant Public Utilities Commission of California advised United in writing that the Commission claimed jurisdiction over the Catalina route and therefore instructed United "to file with this Commission the tariffs covering the service in question." To this, United objected. But in December of 1951, it was again advised by the Commission in writing: "In view of our interpretation of the Civil Aeronautics Act and the California Constitution we again instruct . . . to file with this Commission the tariffs covering the service between Avalon and Long Beach." United and its predecessor, having been regulated by the Civil Aeronautics Board for twelve years as to the Avalon route, United thus found itself confronted with a sudden, belated and somewhat unexplained claim of state jurisdiction. [fol. 67] Being fearful of the consequences besetting a victim of conflicting jurisdictions, United filed this action.

The substance of plaintiff's complaint is that the United States, by the Civil Aeronautics Act of 1938, pre-empted the field of air commerce and transportation involved in

the described route of plaintiff; that federal authority is supreme and that the attempt to exercise jurisdiction by the California Public Utilities Commission would subject the plaintiff to irreparable damage. Declaratory relief is sought. As well, it is claimed that certain parts of the Public Utilities Act of California, under which the defendant Commission is authorized to function, are in violation of the Constitution of the United States.

At the beginning of the litigation, upon request of counsel for plaintiff, pursuant to 28 USC §§2281, 2284, a three judge court was appointed to hear and determine the cause. This was proper because the complaint sought to restrain enforcement of a state statute, inter alia, upon the alleged ground of its unconstitutionality. The court assembled. Heretofore it dismissed the action against defendent Brown, Attorney General of California, and granted Civil Aeronautics Board the right to intervene and allowed it to file a complaint as such intervenor. The cause has been heard upon the merits, upon the complaints of plaintiff and intervenor, and the answers of defendants to both complaints.

We do not reach nor decide the issue tendered, that the state statute is unconstitutional.[1] If the cause required the resolution of no other *federal issue*, obviously this court [fol. 68] could dissolve itself. See Bowles v. Case, 9 Cir.,

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[1] The Supreme Court has made the frequent admonition that federal courts should refrain from invalidating statutes on constitutional grounds when there are other adequate grounds for decision:

> "Hurd v. Hodge, 334 U. S. 24, 30, 68 S. Ct. 847, 92 L.Ed. 1187; Rescue Army v. Municipal Court, 1947, 331 U.S. 549 at page 569, 67 S.Ct. 1409, 91 L.Ed. 1666; Alma Motor Co. v. Timkin-Detroit Axle Co., 1946, 329 U.S. 129, 136, 67 S.Ct. 231, 91 L.Ed. 128; Arkansas Fuel Co. v. State of Louisiana ex rel. Muslow, 1938, 304 U.S. 197, 202, 58 S.Ct. 832, 82 L.Ed. 1287; Baker v. Grice, 1898, 169 U.S. 292, 18 S.Ct. 323, 42 L.Ed. 748.

There would appear to be no good reason why this doctrine should not apply to courts constituted as this one is. See Morgan v. U.S. 107 Fed. Supp. 501, at 504.

149 Fed. 2d 777; affirmed 327 U.S. 92; Ex parte Bransford, 310 U.S. 354; cf. Farmers Gin Co. v. Hayes, 54 Fed. Supp. 43. Penn. Greyhound Lines v. Board of P.U. Comrs. 107 Fed. Supp. 521.

But there are other adequate bases of federal jurisdiction. 28 USC 1331; 28 USC 1337; 28 USC 2201[2]. Such being the case, this Court, having properly acquired jurisdiction, has power to consider and dispose of all questions involved in the suit. Louisville & Nashville Railroad Co. v. Garrett, 231 U.S. 298; Freeman's Ins. Co. v. Beha D.C. 30 Fed. 2d 539; Fisher v. Brucker D.C. 41 Fed. 2d 774.

The Civil Aeronautics Act of 1938 defines interstate air transportation to mean "The carriage by aircraft of persons or property . . . between places in the same state of the United States through the air space over any place outside thereof."

The record here shows, by stipulation, that there is a distance of about 30 miles between the shore line of the United States and the Santa Catalina Island. We have no difficulty in finding, and so find, that a substantial portion of these 30 miles lies over the high seas and is not within the State of California. Hence it follows that air transportation through the air space thereover is over a place outside of the State of California.

The Congress, by the statute, assumed jurisdiction over this area. This it had the power to do. In this field it has supremacy. Since the Congress had the power to assert federal jurisdiction, the plain language of the statute compels the conclusion that the Public Utilities Commission of [fol. 69] the State of California has no jurisdiction or power to regulate in any manner the transportation activities of the plaintiff over the route in question.

Defendants urge that we should decline jurisdiction here in order to allow the state courts to finally adjudicate whether defendant Commission has jurisdiction. They cite the now-oft-quoted case of Alabama Public Service Commission v. Southern Railway Co. 341 U.S. 341. But

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[2] § 1337 gives jurisdiction irrespective of the amount in controversy. Even so, the evidence does sufficiently establish an amount in controversy in excess of $3000.

that case had to do with alleged constitutional improprieties in the enforcement of a state statute, which the Supreme Court said, federal courts should leave to the decision of state courts. Here the Court must appraise the reach of a federal statute when in conflict with state law. In that field it should assert and not forego its jurisdiction. Rice v. Santa Fe Elevator Corp. 331 U.S. 218. See also Cloverleaf Co. v. Patterson, 315 U.S. 169.

It is contended by the defendant Commission that the cause is not ripe enough for equitable relief. It admits that it has, in writing, claimed jurisdiction, but alleges that until the defendant Commission actually holds a hearing and formally seeks to embrace plaintiff, this action is premature. Upon the record here, we hold this contention to be without merit. Bethlehem Steel Corp. v. N.Y. State Labor Relations Board, 330 U.S. 767; Public Utilities Commission of Ohio v. United Fuel Gas Co. 317 U.S. 456; Penn. v. W. Va. 262 U.S. 553.

Plaintiff is entitled to a decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the plaintiff in its operations in the described route and permanently forbidding and enjoining the defendants from, in any manner, interfering with such paramount jurisdiction.

Present findings and decree accordingly.

Dated: December 3, 1952.

[fol. 70] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY PLAINTIFFS

FINDINGS OF FACT—Filed January 12, 1953

1. All of paragraph 4 on pages 2 and 3 of plaintiffs' proposed findings, except the first sentence, is a recital of various statutory provisions of the Civil Aeronautics Act and is not a statement of findings of fact and should therefore be stricken.

2. The statement commencing on line 25 of paragraph 8 [fol. 71] on page 4 of plaintiffs' proposed findings "and operations were otherwise under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board" is a conclusion of law and not a finding of fact and should be stricken from the findings.

3. Likewise the statement commencing on line 15 (of paragraph 9 on page 5) of plaintiffs' proposed findings "and operations have been, and are being, otherwise conducted by United under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board" is also a conclusion of law and not a finding of fact and should be stricken.

4. The finding commencing on line 29 of paragraph 10 on page 5 of plaintiffs' proposed findings: "Subsequently, on February 27, 1952, the defendant Everett C. McKeage, Chief Counsel for the defendant Commission, verbally advised counsel for United that suits would be brought to recover penalties against United for its failure to file its mentioned tariffs with the Commission" should be stricken. This statement is supported by testimony of Mr. Treadwell, but is not supported by the preponderance of the evidence. The statements of counsel for defendants and the testimony of Judge McKeage show that there was and is no intention on the part of the defendants to institute penalty actions against United by reason of its refusal to file tariffs covering its operations between Los Angeles-Wilmington-Long Beach and Avalon until after the jurisdictional question is finally settled and that they do not intend then to seek any penalties except those which accrue after a contumacious refusal on the part of United to comply with a final order of the Public Utilities Commission. (Reporter's Transcript pages 30-33, 38, 45, 47-49, 62-64.) Furthermore, it is a matter of record that the action was not filed by plaintiffs in this Federal District Court until June 25, 1952, almost four months after the conference of February 27, 1952. This would certainly indicate an absence of pressure on United rather than the threat of a penalty of $2,000 per day. (See Judge McKeage's testimony, Reporter's Transcript page 66.)

5. Paragraph 11 of plaintiffs' proposed findings does not set forth accurate findings of fact based upon the record and should be stricken. The following findings [fol. 72] should be substituted therefor:

"The defendants have never had any intention and now have no intention to institute proceedings against United for the recovery of penalties by reason of its refusal to file tariffs covering its operations between Los Angeles-Wilmington-Long Beach and Avalon unless and until such time as the Public Utilities Commission formally finds and declares that it has jurisdiction over the rates and charges in issue by a decision issued in a proceeding instituted before the Commission for the purpose of ascertaining jurisdiction, to which proceeding the plaintiff United Air Lines will be made a party, and then only after such decision has become final; and then defendants will seek only those penalties accruing after such final decision and after a contumacious refusal on the part of plaintiff air carrier to comply with orders set forth in such final decision. The defendants state that they will cause an investigation to be instituted before the Commission should this Court not resolve the jurisdictional dispute between the parties. The prior claims of jurisdiction were made by the Commission pursuant to the advice and recommendation of the Chief Counsel for the Commission, the defendant Everett C. McKeage, and he states that he will again advise the Commission in the proceeding which may be instituted by the Commission that the Commission has and should assert jurisdiction over the rates and charges of United in its operations between Los Angeles-Long Beach-Wilmington and Catalina, if the factual situation remains the same. The plaintiff air carriers will incur expenses in excess of $3,000 in defending themselves in any such proceeding before the defendant Commission."

6. We object to paragraph 12 on pages 6 and 7 of plaintiffs' proposed findings on the ground that this paragraph is not a complete and accurate statement of the facts in the record. A more complete and accurate statement of the facts referred to in said paragraph 12 is as follows:

"Statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day that any public utility violates or fails to comply with any

provision of the Constitution of the State of California or of the Public Utilities Act or fails or neglects to comply [fol. 73] with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the Commission, in a case in which a penalty has not otherwise been provided. The defendants in the past have asserted that these statutory penalties are applicable to air carriers engaged in intrastate common carriage within the State of California and have caused proceedings to be instituted in the California Courts for the recovery of these penalties against various air carriers, including the defendant United, in other cases where such air carriers had tariffs of their rates and charges on file with this Commission and had collected rates and charges in excess of such filed tariffs, and then only after the Commission Decision No. 45624, 50 Cal. P.U.C. 563 (see Reporter's Transcript 20), in which the Commission had determined that it had regulatory jurisdiction over the intrastate rates and charges of air common carriers, had become final by reason of the California Supreme Court refusing to grant review of the decision and by reason of the United States Supreme Court dismissing the appeal from the California Supreme Court on the ground that no substantial federal question was involved.

7. The first sentence of paragraph 13 on page 7 of plaintiffs' proposed findings should be stricken because such finding is not supported by the preponderance of the evidence. Please refer to paragraph 4 above where we have discussed the evidence appearing in the record which relates to threat of seeking penalties.

The second sentence of said paragraph 13 should be stricken because the institution of such an investigation before the Commission being a lawful exercise of administrative authority would not constitute irreparable injury to plaintiffs.

A portion of the last sentence of said paragraph 13 reads as follows:

". . and these certain and possible expenditures may ultimately be borne in whole or in part by the traveling public either in the form of increased transportation charges or less efficient service by United." This finding

should be stricken because it is speculative and is not supported by evidence in the record.

[fol. 74] We propose that the following findings be substituted for paragraph 13 of plaintiffs' proposed findings:

"(1) We find that the letters from the Commission addressed to the plaintiff United directing it to file tariffs did not contain any threat express or implied or any risk that any of the defendants would institute penalty actions or contempt proceedings or request that criminal proceedings be instituted against United or any of its employees for refusal to file tariffs covering its Catalina operations with the Commission; (2) that none of the defendants verbally ever made any such threats; and (3) if any such threats were ever made or if any such risk ever existed, that defendants by statements of counsel and testimony of their witness have removed and dissolved such threats and risk.

"(4) We further find that the declared intention of the Commission to institute an investigation to determine whether it should order plaintiff United to file tariffs covering its Catalina operations and to determine whether it has jurisdiction to do so does not subject plaintiff to any risk of irreparable injury."

CONCLUSIONS OF LAW

We object to paragraph 4 on pages 8 and 9 of plaintiffs' proposed conclusions of law because the institution of any investigation into plaintiff United's operations would not result in irreparable injury to plaintiffs inasmuch as such investigation would constitute the lawful exercise of administrative authority. We further object to said paragraph 4 because proper findings by the Court would state that there is no threat of penalty actions being instituted by any of the defendants against plaintiffs by reason of plaintiff United's past and present refusal to file [fol. 75] tariffs with the Commission covering its Catalina operations.

Respectfully submitted this 12th day of January, 1953.

(S.) Everett C. McKeage, Chief Counsel; J. Thomason Phelps, Senior Counsel; Wilson E. Cline, Attorneys for Defendants, 514 State Building, San Francisco, California.

[fol. 76] IN UNITED STATES DISTRICT COURT

[Title omitted]

OBJECTIONS TO JUDGMENT PROPOSED BY PLAINTIFFS—January 12, 1953

1. We object to paragraph 1 on page 2 of the ordering portion of plaintiffs' proposed judgment because it is too broad in its scope. The only claim of jurisdiction by defendants is over the *rates and charges* of *plaintiff United* [fol. 77] *Air Lines, Inc.* The record does not show any claim of jurisdiction by defendants over any other aspect of United's Catalina operations, nor does it show any claim of jurisdiction over plaintiff Catalina Air Transport which is not presently operating. Further, defendants are entitled to have the route clearly described in the order.

We propose that said paragraph 1 should be revised to read as follows:

> "1. That the Civil Aeronautics Board has exclusive jurisdiction over the rates and charges of plaintiff United Air Lines, Inc., in connection with its operations over the route between the mainland of the United States, at Los Angeles-Wilmington-Long Beach, Los Angeles County, California, and Avalon on Santa Catalina Island, California."

2. For similar reasons paragraph 2 on pages 2 and 3 of the ordering portion of plaintiffs' proposed judgment should be revised to read as follows:

> "2. That the defendants and their employees, agents and attorneys, and all persons claiming by, through or under them, be and they hereby are permanently prohibited and enjoined from in any manner interfering with the paramount jurisdiction of the Civil Aeronautics Board over the rates and charges of plaintiff United Air Lines, Inc., in connection with its operations over the route between the mainland of the United States, at Los Angeles-Wilmington-Long Beach, Los Angeles County, California, and Avalon on Santa Catalina Island, California, or from in any way controlling

or regulating the rates and charges of plaintiff United Air Lines, Inc., in connection with its operations over said route."

[fol. 78] 3. The first sentence of paragraph 3 on page 3 of the ordering portion of plaintiffs' proposed judgment should be revised to include defendants as well as plaintiffs and intervenors as follows:

"The court has not by this decree passed upon or adjudged the constitutionality or validity of any acts of the Legislature of the State of California imposing penalties, nor has it passed upon the question as to whether air lines such as plaintiffs' come within the purview of said acts, and this judgment is without prejudice to any right of the plaintiffs or the intervenor or the defendants with regard thereto."

Respectfully submitted this 12th day of January, 1953. (S.) Everett C. McKeage, Chief Counsel; J. Thomason Phelps, Senior Counsel; Wilson E. Cline, Attorneys for Defendants, 514 State Building, San Francisco, California.

[fols. 79-80] AFFIDAVIT OF SERVICE BY MAIL

(Omitted in printing)

[fol. 81] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law

FINDINGS OF FACT—Filed January 27, 1953

From the pleadings and evidence in the above-entitled action, the Court finds:

1. The plaintiff Catalina Air Transport is, and at all times mentioned herein was, a corporation organized and

incorporated under the laws of the State of California. [fol. 82] 2. The plaintiff United Air Lines, Inc., is, and at all times mentioned herein was, a corporation organized and incorporated under the laws of the State of Delaware and is and was a citizen resident of the State of Delaware.

3. The defendant Public Utilities Commission of the State of California is a regulatory Commission of the State of California; and the defendants Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, are members of said Commission and collectively constitute said Commission, and are citizens and residents of the State of California, and have and maintain the principal office of the Commission within the State of California and the district of this court. The defendants Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps are legal advisers of the said Public Utilities Commission, are citizens and residents of the State of California, and maintain their offices within the said principal office of the Public Utilities Commission.

4. The intervenor Civil Aeronautics Board is an agency of the United States created by and charged with responsibility for, among other things, the administration and enforcement of the economic regulatory provisions of the Civil Aeronautics Act of 1938 (52 Stat. 973, 49 U.S.C. 401 *et seq.*) That Act empowers the Board to issue certificates of public convenience and necessity authorizing air carriers to engage in interstate air transportation (49 U.S.C. 401(2), 401(21), 481). Interstate air transportation is defined by the Civil Aeronautics Act to include "the carriage by aircraft of persons or property as a common carrier for compensation or hire—in commerce between—places in the same State of the United States through the air space over any place outside thereof" (49 U.S.C. 401(21)(a)). Tariffs for such interstate air transportation must be filed with the Board and observed by the [fol. 83] carrier (49 U.S.C. 483), and rates and practices in interstate air transportation may be prescribed by the Board (49 U.S.C. 484, 491, 642). Service may not be suspended or terminated except by leave of the Board (49 U.S.C. 481(k)), and contracts between air carriers re-

lating to interstate air transportation, including contracts whereby one carrier conducts operations on behalf of another, must be filed with the Board for its approval or disapproval (49 U.S.C. 488, 492).

5. Santa Catalina Island is an island located in the Pacific Ocean, and is a part of the State of California. The distance between the shorelines of the island and of the mainland of California is thirty miles.

6. On October 13, 1939, the Civil Aeronautics Authority, now known as the Civil Aeronautics Board, issued a certificate of public convenience and necessity to Wilmington-Catalina Airline, Ltd., the predecessor of the plaintiff Catalina Air Transport, authorizing the air transportation of persons and property between Wilmington, on the mainland of California, and Avalon, on Santa Catalina Island, California. This award was based upon findings that the boundaries of California did not extend beyond a distance of three miles from the shoreline of the mainland, and beyond a distance of three miles from the shoreline of Santa Catalina Island. Since aircraft flying between Avalon and Wilmington were required to fly over approximately 24 miles of water not within the boundaries of the State of California, the Board concluded that common carrier transportation by aircraft between these points constituted interstate air transportation as defined by the Civil Aeronautics Act. *Wilmington-Catalina Air, Grandfather certificate,* 1 Civil Aeronautics Authority Reports 431.

7. On July 22, 1941, the Civil Aeronautics Board extended the route of Wilmington-Catalina Airline, Ltd. to [fol. 84] Los Angeles, California, so that the carrier was then authorized to conduct operations between Los Angeles and Avalon, Santa Catalina Island, via the intermediate point Wilmington-Long Beach, California. At the same time, the Board reissued the certificate in its entirety to reflect the change of the carrier's name from Wilmington-Catalina Airline, Ltd., to Catalina Air Transport. *Catalina Air, Service to Catalina Island,* 2 Civil Aeronautics Board Reports 798. Such amended certificate has ever since continued in full force and effect.

8. Operations continuously were conducted by Wilmington-Catalina Airlines, Ltd. and by Catalina Air Transport

over the routes hereinbefore described in accordance with and pursuant to the certificates of public convenience and necessity issued by the Civil Aeronautics Board, from October 13, 1939 until the carrier's equipment was requisitioned by the United States Government for military purposes in 1942. On July 23, 1942, the Board authorized the carrier to suspend operations because of the mentioned equipment requisition. This authorized suspension of service continued for the duration of the war and thereafter until operations over the route were begun by the plaintiff United Air Lines, Inc. Tariffs for the carriage of persons and property were maintained on file with the Civil Aeronautics Board, and not with the defendant Public Utilities Commission during all periods of operation by Wilmington-Catalina Airlines, Ltd. and its successor Catalina Air Transport; and operations were otherwise conducted under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board. All such operations constituted common carriage by aircraft for compensation and hire.

9. On June 3, 1946, the Civil Aeronautics Board approved an operating contract between the plaintiff United Air Lines, Inc. and Catalina Air Transport, dated March 7, 1946, whereby it was agreed that United would perform and [fol. 85] discharge all of the obligations of Catalina Air Transport under its certificate of public convenience and necessity. United Air Lines, Operation of Catalina Air Transport, 6 Civil Aeronautics Board Reports 1041. Various supplemental agreements relating to the rates and fares to be charged to the public for the transportation provided by United subsequently were filed with and approved by the Board, together with various other agreements relating to miscellaneous details of the operation. Said operating contract, and the approval thereof by the Board, have been continuously in effect since the date of initial approval by the Board, and operations have been and are being conducted by United thereunder. Tariffs for the carriage of persons and property have been, and are, maintained on file by United with the Civil Aeronautics Board, and not with the defendant Public Utilities Commission, and operations have been, and are being, otherwise

conducted by United under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board. All such operations constituted, and constitute, common carriage by aircraft for compensation and hire.

10. On September 20, 1951, the defendant Public Utilities Commission advised United by letter that the Commission had jurisdiction as to the rates and charges for the operation in question, and directed United to file its tariffs therefor with the Commission. United objected, asserting that its operations were subject only to the control and jurisdiction of the Civil Aeronautics Board. Thereafter, on December 27, 1951, the Commission again advised United by letter that the Commission had jurisdiction over the Santa Catalina operations, and again directed United to file its tariffs with the Commission.

[fol. 86] 11. The defendants by their answers to the complaints herein and by their testimony disclaim any present intention to institute proceedings against United for the recovery of the said penalties unless and until such time as the Public Utilities Commission formally finds and declares that it has jurisdiction over the operations in issue in a proceeding instituted before the Commission for the purpose of ascertaining jurisdiction, to which proceeding the plaintiff air carriers will be made parties, and then only if United thereafter fails to file its tariffs with the Commission after having been formally ordered to do so. The defendants state that they will cause such a proceeding to be instituted before the Commission unless this Court resolves the jurisdictional dispute between the parties. The prior assertions of jurisdiction were made by the Commission pursuant to the advice and recommendation of the Chief Counsel for the Commission, the defendant Everett C. McKeage, and he states that he will again advise the Commission in the proceeding which will be instituted by the Commission that the Commission has and should assert jurisdiction over the operations here involved with respect to tariffs, rates and charges. The plaintiff carriers will incur expenses in excess of $3,000 in defending any such proceeding before the defendant Commission.

12. Statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day

that operations are conducted by carriers without effective tariffs being on file with the defendant Public Utilities Commission. The defendants in the past have asserted that these statutory penalties are applicable to air carriers, and have caused proceedings to be instituted in the California Courts for the recovery of these penalties against various air carriers, including the defendant [fol. 87] United, in other cases wherein disputes have existed concerning the regulatory jurisdiction of the defendant Public Utilities Commission.

13. The refusal of the plaintiff United to heretofore comply with the directives of the defendant Commission to file tariffs, and any refusal to comply with any future such directive, has and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for the recovery of penalties. Apart from these risks, United is confronted with the necessity for incurring the expenditures incident to defending a proceeding certain to be instituted before the defendant Commission unless this Court resolves the controversy presented. No provisions exist under which United may recover its expenditures from the defendants, and these certain and possible expenditures may ultimately be borne in whole or in part by the traveling public either in the form of increased transportation charges or less efficient service by United.

14. The Court has not in these findings made any findings as to the constitutionality of the Acts of the Legislature of the State of California imposing penalties referred to in the complaint, or the question as to whether such Acts are applicable to the plaintiffs as air carriers, for the reason that the same involve the constitutionality of state laws and a decision on said questions is not necessary to final determination of this controversy.

Conclusions of Law

Upon the basis of the foregoing findings, the Court concludes:

1. This Court has jurisdiction under 28 U.S.C. 1331 in that the amount in controversy exceeds $3,000, exclusive of [fol. 88] interests and costs, and the case arises under the Constitution (Article 1, Section 8) and laws of the United States (Civil Aeronautics Act of 1938, 49 U.S.C. 401, et seq.); under 28 U.S.C. 1337 in that the case arises under an Act of Congress regulating commerce (Civil Aeronautics Act of 1938, 49 U.S.C. 401 et seq.); and under 28 U.S.C. 2201 in that an actual controversy exists between the parties concerning the question of whether the plaintiff air carriers are to be regulated by the Public Utilities Commission of the State of California or by the Civil Aeronautics Board.

2. The Civil Aeronautics Board is entitled to seek and obtain a ruling as to its powers and jurisdiction as a plaintiff-intervenor in this case, and to obtain declaratory and injunctive relief against any interference by the defendants with its jurisdiction.

3. The complaint herein seeks, *inter alia*, to restrain the enforcement of a statute of the State of California upon the grounds that certain penalties provided therein which may be applicable to air carriers are so unreasonable and oppressive as to be in violation of the Fourteenth Amendment to the Constitution of the United States. A substantial question would have been presented as to the constitutionality of these penalty provisions, if reached, and the appointment of a three-judge Court pursuant to 28 U.S.C. 2281 and 2284 was appropriate and required for the purpose of enabling the Court to resolve all issues presented by the air carrier plaintiffs. Having properly acquired jurisdiction, this statutory three-judge Court has jurisdiction to consider and dispose of this case even though its disposition is on grounds other than those relating to the constitutional issue which necessitated the assembling of the Court.

4. The proceeding before the defendant Public Utilities Commission which the defendants, unless precluded by action of this Court, intend to institute against the plaintiff [fol. 89] air carriers will subject said air carriers, and possibly the public, to irreparable injury if the said Commission has no jurisdiction in the premises, and would constitute a burden on interstate commerce and an interference with the jurisdiction of the Civil Aeronautics Board. These factors, coupled with the risks and expenditures to which the plaintiffs may be subjected as a result of possible penalty actions, and the actual controversy which exists between the parties, are such as to entitle both the plaintiffs and the intervenor to declaratory relief, and injunctive relief against actions which the defendants might otherwise institute concerning a subject matter over which the defendant Commission and the State of California are hereinafter found to lack jurisdiction. Plaintiffs have no plain, speedy and efficient remedy in the Courts of the State of California, or otherwise, than by this action. Further, since the matter in issue concerns the reach of a Federal statute which conflicts with the claims of the defendants regarding state law, this Court should decide the issues tendered irrespective of the existence or adequacy of any state Court remedies.

5. Without reaching or considering the status of the waters of the three-mile marginal belts along the coastline of the mainland of the State of California, and surrounding Santa Catalina Island, as territorial waters of the State of California for regulatory purposes, we conclude and hold that the intervening waters between these marginal belts are wholly outside the territory and jurisdiction of the State of California, and that aircraft passing over these intervening waters are passing through air space over a place outside of the State of California.

6. Congress has power to regulate all phases of transportation between places in the same State when that transportation involves passage through or over territory or waters outside the State, and it has asserted that power in the field of air transportation through the adoption of the [fol. 90] Civil Aeronautics Act of 1938, and by declaring

therein that all such common carrier transportation by aircraft constitutes interstate air transportation. The Civil Aeronautics Act provides for complete and detailed regulation by the Civil Aeronautics Board over all phases of interstate air transportation, including rates and charges therefor, and the Board has regulated and is regulating all phases of plaintiffs' operations between Santa Catalina Island and the mainland of the State of California. Such operations by the plaintiff air carriers constitute interstate air transportation as defined by the said Act, and the powers conferred upon and exercised by the Board leave no room for State regulation of these operations.

7. The plaintiffs and the intervenors are entitled to a decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the plaintiffs in their mentioned operations, and permanently forbidding and enjoining the defendants from, in any manner, interfering with such exclusive jurisdiction.

Dated this 27th day of January, 1953.

Wm. E. Orr, Circuit Judge; Louis E. Goodman, District Judge; Edward P. Murphy, District Judge.

[fol. 91] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 31638

UNITED AIR LINES, INC., a corporation; and CATALINA AIR TRANSPORT, a corporation, Plaintiffs,

CIVIL AERONAUTICS BOARD, Intervenor,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public Utilities Commission of the State of California, Defendants

Before: Hon. William E. Orr, Circuit Judge, Hon. Louis E. Goodman, District Judge, Hon. Edward P. Murphy, District Judge.

JUDGMENT—Filed January 27, 1953

In the above-entitled action the defendants Public Utilities Commission of the State of California, Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, Peter E. Mitchell, Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, appeared and answered by their attorneys, Hon. Everett [fol. 92] C. McKeage, Chief Counsel, and Mr. J. Thomason Phelps; the Civil Aeronautics Board, by leave of the court duly had and obtained, appeared and filed a complaint in intervention by their attorneys, Messrs. Chauncey Tramutolo, United States Attorney, Charles Elmer Collett, Assistant United States Attorney, James E. Kilday, Special Assistant to the Attorney General, Emory T. Nunneley, Jr., General Counsel, and O. D. Ozment, Assistant to General Counsel, and said defendants answered said complaint

in intervention. At the inception of said case the plaintiffs properly requested the submission thereof to a three-judge court, pursuant to the provisions of 28 USC Secs. 2281, 2284, for the reason that said action raised the question of the unconstitutionality, under the Fourteenth Amendment to the Constitution of the United States, of the acts of the Legislature of the State of California imposing penalties referred to in the complaint, and such a court was assembled, consisting of Hon. William E. Orr, Circuit Judge, Hon. Louis E. Goodman, District Judge, and Hon. Edward F. Murphy, District Judge. The cause came on regularly for trial on the 21st day of November, 1952, and evidence, both oral and documentary, was introduced, and said matter was argued by the parties and submitted to the court, and the court, being now fully advised in the premises and having filed herein its findings of fact and conclusions of law,

Now, therefore, by reason of the law and the findings aforesaid, it is by the court here ordered, adjudged, and decreed:

1. That the Civil Aeronautics Board has exclusive jurisdiction over the plaintiffs in their operations over the route described in the complaint, and the defendants have no jurisdiction or power of regulation over the same;

2. That the defendants and their employees, agents and attorneys, and all persons claiming by, through or under them, be and they hereby are permanently prohibited and [fol. 93] enjoined from in any manner interfering with such paramount jurisdiction of the Civil Aeronautics Board, or from in any way controlling or regulating said route;

3. The court has not by this decree passed upon or adjudged the constitutionality or validity of any Acts of the Legislature of the State of California imposing penalties, nor has it passed upon the question as to whether air lines such as plaintiffs' come within the purview of said Acts, and this judgment is without prejudice to any right of the plaintiffs or the intervenor with regard thereto. The reason that the court has not passed on such questions is the policy of the court not to pass upon the constitutionality or construction of state statutes, the constitutionality or con-

struction of which has not been passed upon by the courts of the state, where the same is not necessary to a determination of the controversy before the court, and the court finds that a decision on those questions is not necessary to the determination of the controversy here involved.

Dated this 27th day of January, 1953.

Wm. E. Orr, Circuit Judge; Louis E. Goodman, District Judge; Edward P. Murphy, District Judge.

Entered in civil docket January 28, 1953.

[fol. 94] In United States District Court

[Title omitted]

Notice of Entry of Decree and Judgment

To Messrs. Treadwell and Laughlin, Attys., 955 Mills Tower, San Francisco; Mr. Everett C. McKeage, Atty., 514 State Building, San Francisco; United States Attorney, PO Building, San Francisco.

You are hereby notified that on January 28, 1953 a Decree and Judgment was entered of record in this office in the above entitled case.

You are hereby notified that on —— a Notice of Appeal was filed by —— in the above entitled case. A copy of which is enclosed herewith.

C. W. Calbreath, Clerk, U. S. District Court.

mpb.

California, San Francisco, January 28, 1953.

[fol. 95] Notice of Hearing of Motion

(Omitted in printing)

[fol. 96] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR NEW TRIAL—Filed February 6, 1953

Now comes the defendants in the above-entitled cause, and move this Court for an order setting aside the findings and conclusions of law and judgment herein and granting a new trial of the above-entitled cause, for the following reasons:

1. Since the trial of this case the United States Supreme [fol. 97] Court has decided the case of *Public Service Commission of Utah* v. *Wycoff Company, Inc.*, No. 44, October Term, 1952, —— U.S. ——, 97 L. ed. (Advance p. 176), 21 Law Week 4077, which decision is determinative of the law in favor of the defendants in the present case and contrary to the decision of this Court. The decision of the United States Supreme Court in the Wycoff case supports the contention of defendants that plaintiffs herein are entitled to no relief in the Federal District Court because there exists an adequate remedy in the courts of the State of California for the purpose of reviewing any action already taken or that may be taken by the defendants herein pertaining to the subject matter of the above-entitled action. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to the United States Supreme Court by direct appeal from a decision of a state court in favor of the validity of a state statute (or as in this case an order of the defendant Commission which is in law a statute)[1] where its validity

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[1] Grand Trunk Western Railway Co. v. Railroad Commission of Indiana, 221 U.S. 400 at 403, 55 L. ed. 786 at 787; Bluefield Water Works and Improvement Company v. Public Service Commission, 262 U.S. 679 at 683, 67 L. ed. 1176 at 1179; Pacific States Box and Basket Company v. White, 296 U.S. 176 at 185 to 186, 80 L. ed. 138 at 146.

is questioned on the ground of its being repugnant to the Constitution, treaties or laws of the United States.[2]

2. This Court has erroneously found and concluded that the letters dated September 20, 1951, and December 27, 1951, from the Secretary of the Commission instructing plaintiff United to file tariffs covering the service here in question are orders of the Commission which raise such a justiciable controversy and subject plaintiffs to such threats of irreparable injury as to entitle them to the relief granted by the judgment of this Court.

3. Although the said letters from the Secretary of the Commission when issued may have caused plaintiffs to as- [fol. 98] sume that a justiciable controversy had arisen and that they were subject to a threat of irreparable injury, this Court has erroneously found and concluded that defendants by statements of counsel and testimony of their witness (i.e., that such letters were not intended to be a final determination of the jurisdictional question by the Commission and that the defendants had no intention of requiring plaintiff United to comply with the instructions contained in said letters, as such, but only an intention of instituting an investigation and requiring plaintiffs prospectively to comply with the orders therein issued by the Commission which had become final) have not removed and dissolved such justiciable controversy and threat of irreparable injury.

4. If the said letters from the Secretary of the Commission are orders of the Commission and are not subject to interpretation and explanation by defendants as set forth in the preceding paragraph numbered (3), the plaintiff United has failed to exhaust its administrative remedies in that no petition for rehearing has been filed with the Commission and no petition for review has been filed with the Supreme Court of the State of California. Said plaintiff's failure to exhaust its administrative remedies precludes this Court from granting the relief requested by said plaintiff.

5. This Court has erroneously found and concluded that the declared intention of defendants to institute an investi-

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[2] 28 U.S.C.A. 1257 (2).

gation before the Commission for the purpose of ascertaining its jurisdiction over plaintiff United raises such a justiciable controversy and subjects plaintiffs to such threats of irreparable injury as to entitle them to the relief granted by the judgment of this Court.

6. This Court has erroneously found and concluded that a substantial portion of the waters between the California mainland and Santa Catalina Island are outside the State of California.

7. This Court has erroneously found and concluded that the air transportation service of plaintiffs in question is interstate commerce.

8. This Court has erroneously found and concluded that [fol. 99] Congress through the adoption of the Civil Aeronautics Act of 1938 has preempted the field of regulation of air transportation between places in the State of California when that transportation involves passage through the air space over the high seas.

9. If the letters dated September 20, 1951, and December 27, 1951, from the Secretary of the Commission to plaintiff United are orders of the Commission they are orders affecting intrastate rates and the Johnson Act precludes this Court from issuing an injunction restraining the enforcement of such orders.

10. The provisions of the Constitution of the State of California under which defendants claim jurisdiction over plaintiffs pertain only to rates, fares and charges. Defendants have never claimed jurisdiction over any other aspect of plaintiffs' Catalina operations. In so far as the judgment of this Court restrains defendants from asserting jurisdiction over matters other than rates, fares and charges of plaintiffs, it is not supported by the record and is in error.

This motion is based upon the evidence and all the files and records in this action.

Argument

I

The facts in the recent case of *Public Service Commission of Utah* v. *Wycoff Company, Inc.*, No. 44, October Term,

1952, —— U.S. ——, 97 L. ed. (Advance p. 176), 21 Law Week 4077, have been summarized in the decision of the United States Court of Appeals from which the appeal was taken, 196 F (2) 252, as follows:

> "Wycoff Company, Inc., is a Utah corporation engaged in the transportation of property as a common carrier by motor vehicle. Its business consists of transporting motion picture films and news reels between various picture exchanges in Salt Lake City and between individual exhibitors, both within and without the State of Utah. It holds a certificate of convenience and necessity as to its interstate transportation from the Interstate Commerce Commission, but has refused to acknowledge the jurisdiction of the Public Service Commission of Utah as to its transportation activities beginning and ending wholly within the State of Utah. When the Public Service Commission of Utah sought [fol. 100] to exercise jurisdiction over such last-named activities,[1] Wycoff brought a declaratory judgment action in the United States District Court for the District of Utah for judgment declaring that all of its activities were interstate and enjoining the State Commission from interfering with its transportation of motion picture film and news reels over its routes within Utah, as authorized by the Interstate Commerce Commission.[2] * * *

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[1] *The Utah Commission had brought suit to enjoin such activities and such suit is pending in the Utah Court.*

[2] *The Commission's answer to the complaint filed in the United States District Court denied that it was interfering with interstate commerce, not because it did not intend to prevent respondent from operating, but on the ground that the operations were deemed to be intrastate commerce and therefore subject to its regulation.*

Paragraphs (4), (5), (6), (7) and (8) of Wycoff Company's complaint in the United States District Court read as follows:

> "(4) 'That the Public Service Commission of Utah issued to plaintiff and Interstate License,' No. 314,

"Most picture films originate in the laboratories of national distributors in New York, New Jersey, and Los Angeles. The distributors have set up a system of exchanges in various sections of the country, to which they send all motion picture films for exhibitors in a designated area. Such exchanges are maintained in Salt Lake City, Utah.

"All motion picture houses (exhibitors) obtain their films from the national distributors under contract with them. * * * It provides that after a picture is released for public exhibition and becomes available for exhibition by the exhibitors, the distributor agrees to deliver a print of the motion picture to the exhibitor. The film is then sent to the exchange, in this case Salt Lake City, where it is processed and readied for exhibition. In the contract the distributor agrees to make delivery of the film contracted for 'to the Exhibitor or to the Exhibitor's authorized agent, by delivery at the Distributor's exchange, or to a common carrier, or to the United States Postal authorities, *as the Distributor may elect.*' The exhibitor agrees to show the film at

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under date of August 9, 1949, by which plaintiff is authorized to transport in interstate commerce within the State of Utah motion picture films in pursuance of plaintiff's interstate commerce Certificate No. MC89684 and all subs and amendments thereto. Said Interstate License is still in full force and effect and has not been revoked or cancelled.

"(5) That the transportation of motion picture film and newsreels is interstate in its character, and the Interstate Commerce Commission has, by appropriate orders, so declared such to be a fact, and has exercised its jurisdiction thereover as to authority, rates, and safety regulations.

"(6) That the defendant Commission and the defendant members thereof threaten to and are attempting to stop and prevent plaintiff from transporting motion picture film and newsreels between points and places within the State of Utah, and they are thereby interfering with the conduct of interstate commerce by the

the designated date and, at the conclusion of such showing, transport it to the next exhibitor at his expense. Thus in rotation each exhibitor agrees to transport the film at his own expense until it reaches the last exhibitor, who then is obligated to deliver it at his cost back to the exchange, from where it is returned to the distributor for final disposal. * * *"

[fol. 101] The United States District Court refused to issue the injunction on the ground that the transportation in question was in intrastate commerce and subject to regulation by the Utah Commission. The United States Court of appeals found that the transportation in question was in interstate commerce, reversed the judgment of the lower court, and remanded the case.

In the majority opinion delivered by Justice Jackson the United States Supreme Court found that Wycoff offered no evidence whatever of any past, pending or threatened action

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plaintiff and imposing an undue burden upon interstate commerce.

"(7) That unless the defendants are enjoined, they will block, harass and prevent plaintiff in the transportation of said motion picture film and newsreel in Utah, to the detriment of plaintiff and the shipping public, and plaintiff has no other speedy or adequate remedy and will suffer irreparable injury unless defendants are enjoined from their threatened action.

"(8) That this case arises under the Constitution and the laws of the United States in that Section 8 of Article I of said Constitution grants to the Congress of the United States the power to regulate commerce among the several states, and the Congress has delegated to the Interstate Commerce Commission power and authority to ascertain the nature of interstate commerce and the exclusive authority to regulate the same.

The Utah Commission's answer to these paragraphs of the Complaint reads as follows:

"Defendants admit the allegations of paragraphs four (4) and five (5) of said complaint except the parts of said paragraphs alleging or inferring that the trans-

by the Utah Commission touching its business in any respect even though the pleadings (see footnote [2] above) made that a clear-cut issue. Such matter was in issue only if the transportation in question was in interstate commerce. The pleadings of the Utah Commission admitted the allegations respecting the threat of irreparable injury to the extent such allegations applied to intrastate transportation, and the answer showed that the Utah Commis-[fol. 102] sion considered all the transportation in question to be intrastate.

The court, however, does not base its decision solely on the ground of lack of proof of any threatened or probable act of the defendants which might cause irreparable injury but relies also on other defects appearing in its discussion of declaratory relief.

The language of the decision is so appropriate we can do no better than to quote from it:

"Even when there is no incipient federal-state conflict, the declaratory judgment procedure will not be

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portation of motion picture film (except newsreels) by plaintiff between points in and within the State of Utah is interstate in character, or that the Public Service Commission of Utah has by issuance of an 'Interstate License' thereby declared that said transportation of motion picture film within the State of Utah or wholly between points in the State of Utah is in interstate commerce or interstate in character, or that the Interstate Commerce Commission has by any of its orders or otherwise declared such transportation to be interstate in character, which parts are specifically denied.

"Defendants admit the allegations of paragraphs six (6), seven (7), and eight (8) except the parts alleging or inferring that defendants are interfering or attempting to interfere with the conduct of transportation in interstate commerce by the plaintiff, or that defendants are imposing or attempting to impose a burden upon such interstate commerce, or that defendants are blocking or preventing plaintiff from the conduct of transportation of motion picture film in interstate commerce, which parts are specifically denied."

used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Eccles* v. *Peoples Bank*, 333 U.S. 426. See *Colegrove* v. *Green*, 328 U.S. 549. Responsibility for effective functioning of [fol. 103] the administrative process can not be thus transferred from the bodies in which Congress has placed it to the courts.

"But, as the declaratory proceeding is here invoked, it is even less appropriate because, in addition to foreclosing an administrative body, it is incompatible with a proper federal-state relationship. The carrier, being in some disagreement with the State Commission, rushed into federal court to get a declaration which either is intended in ways not disclosed to tie the Commission's hands before it can act or it has no purpose at all.

"Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is

even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata*, so that the Commission can not hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

"The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.

"In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. Where the complaint is an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense [fol. 104] to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law. *Tennessee*

v. *Union and Planters' Bank*, 152 U.S. 454; *The Fair* v. *Kohler Die and Specialty Co.*, 228 U.S. 22; *Taylor* v. *Anderson*, 234 U. S. 74.

"Since this case should be dismissed in any event, it is not necessary to determine whether, on this record, the alleged controversy over an action that may be begun in state court would be maintainable under the head of federal-question jurisdiction. But we advert to doubts upon that subject to indicate the injury that would be necessary if the case clearly rested merely on threatened suit in state court, as, for all we can learn, it may.

"We conclude that this suit cannot be entertained as one for injunction and should not be continued as one for a declaratory judgment. The judgment below should be reversed and modified to direct that the action be dismissed."

In conclusion we again wish to point out to this Court that defendants are making no claim under federal law. The claim of jurisdiction over plaintiffs' rates and charges is founded upon Sections 20 and 22 of the Constitution of the State of California.

II

Sections 1701 through 1706 of the Public Utilities Code of the State of California set forth the rules governing the issuance of orders by the defendant Commission. These provisions read as follows:

"1701. All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission.

"1702. Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agri-

cultural, or manufacturing association or organization, or any body politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or change heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission. No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, or telephone corporation, unless it is signed by the mayor or the president or chairman of the board of [fol. 105] trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, electricity, water, or telephone service.

"1703. All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of causes of action or grievances or misjoinder or nonjoinder of parties. In any review by the courts of orders or decisions of the commission the same rule shall apply with regard to the joinder of causes and parties as herein provided. The commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant.

"1704. Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the corporation or person complained of. Service in all hearings, investigations, and proceedings pending before the commission may be made upon any person upon whom a summons may be served in accordance with the provisions of the Code of Civil Procedure, and maybe made personally or by mailing in a sealed envelope, registered, with postage prepaid. The commission shall fix the time when and place where a hearing will be had upon the complaint and shall serve notice

thereof, not less than 10 days before the time set for such hearing, unless the commission finds that public necessity requires that such hearing be held at an earlier date.

"1705. At the time fixed for any hearing before the commission or a commission, or the time to which the hearing has been continued, the complainant and the corporation or person complained of, and such corporations or persons as the commission allows to intervene, shall be entitled to be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all necessary witnesses. After the conclusion of the hearing, the commission shall make and file its order, containing its decision. A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney. The order shall, of its own force, take effect and become operative 20 days after the service thereof, except as otherwise provided, and shall continue in force either for a period designated in it or until changed or abrogated by the commission. If the commission believes that an order cannot be complied with within 20 days, it may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may on application and for good cause shown, extend the time for compliance fixed in its order.

"1706. A complete record of all proceedings and testimony before the commission or any commissioner on any formal hearing shall be taken down by a reporter appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review an order or decision of the commission, a transcript of such testimony, together [fol. 106] with all exhibits or copies thereof introduced, and of the pleadings, record, and proceedings in the cause, shall constitute the record of the commission, but if the petitioner and the commission stipulate that certain questions alone and a specified portion only of the evidence shall be certified to the Supreme Court for

its judgment, such stipulation and the questions and the evidence therein specified shall constitute the record on review."

The above provisions of the Public Utilities Code clearly show that the letters from the Secretary of the Commission to the plaintiff United should not be construed as orders of the Commission which will subject United to the pains and penalties of the law. The Commission being a creature of the law, it may operate only pursuant thereto, and whatever may have been the fear or the misunderstanding of the plaintiffs the law controls and the plaintiffs, of course, are presumed to know the law.

Section 1702 of the Public Utilities Code envisions the type of procedure which was followed in this case. It provides that where a utility has done or has omitted to do anything in violation of law or an order or rule of the Commission, the Commission or any other person may file a complaint against the utility. The matter is then heard and the decision and order of the Commission follows.

The law required the plaintiff United in this case to file its rates with the Commission. It had not done so and the Commission by letters called the matter to United's attention and instructed it to comply with the law. This plaintiff United has refused to do, and it follows under the established procedure that a complaint would be filed by the Commission pursuant to the provisions of Section 1702 of the Public Utilities Code. *Instead of the letters of the Commission being the end of the administrative process they were merely the beginning of the administrative process under the law.*

Such letters were merely preliminary to the issuance of an order of investigation and were notice to plaintiff United that it might expect an order of investigation to be instituted as provided by the applicable law. They were issued for the purpose of placing plaintiff [fol. 107] United upon notice so that it could not say that an order of investigation had been issued against it out of the blue sky and without the courtesy of its having been apprised of the intention of the Commission. Furthermore, a voluntary compliance by plaintiff United with the in-

struction to file its tariff would have obviated the necessity of the issuance of an order of investigation.

III

In paragraph II above we have pointed out that the letters from the Secretary of the Commission were the beginning of the administrative process rather than the end and that plaintiff United would be presumed to know this. In addition at the time of trial statements of counsel for defendants and the testimony of their witness fully explained the purport of the letters and the intention of the Commission respecting the procedure to be followed in seeking to require plaintiffs United to file its tariffs.

We quote from pages 61 and 62 of Reporter's Transcript of the hearing on November 21, 1952:

"Mr. Phelps: Q. I shall just ask the Judge to describe what the position of the Commission, with respect to this Catalina operation, was prior to the bringing of this suit and what it is now.

"Mr. Treadwell: We object to that, Your Honor. This is calling for the conclusion of the witness. The position of the Commission is shown by the answer which we are trying this case on. It shows exactly what its position is, and it is also shown by the letters written by the Commission, the Commission's Secretary, insisting in their right to regulate this line, these rates, and it is also shown in a certain way by certain testimony of mine. I don't think the witness could give his conclusion.

"Judge Orr: The objection is overruled.

A. The intention—I can speak for myself, in the statutory duty that I perform, there was no intention on my part to bring penalty actions against this air carrier in connection with this Catalina operation. There was no intention on the part of the Commission to do so either. The only intention that was ever expressed was that if these rates were not filed that an order of investigation would be instituted where the question of jurisdiction would be determined in the orderly course of due process of law.

"We have never changed our position. That was our intent then. That is our intent now."

[fol. 108] Such testimony clearly shows that the Commission never intended such letters to be final orders but intended them to place plaintiff on notice that formal proceedings would be instituted if they were not complied with. The factual situation at the time of trial, and not what may have been plaintiffs' unfounded apprehensions arising through their failure to understand the normal administrative processes of the defendant Commission, should govern this Court in its determination whether a justiciable controversy has arisen and whether a permanent injunction should issue.

IV

On the one hand, plaintiffs have said to this Court that the letters from the Secretary of the Commission have the dignity of orders of the Commission. With this proposition defendants, as previously discussed, do not agree. On the other hand, plaintiffs have said that they have no administrative remedy themselves but must wait for the Commission to institute an investigation. Assuming for the sake of argument that the letters are orders issued in a complaint or investigation proceeding, as no effective date is specified, in accordance with Rule 74 of the defendant Commission's Rules of Procedure they would become effective 20 days after service.

Sections 1731 and 1756 of the Public Utilities Code read as follows:

"1731. After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any

corporation or person unless the corporation or person has made, before the effective date of the order or decision, application to the commission for a rehearing.

"1756. Within 30 days after the application for [fol. 109] a rehearing is denied, or if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable not later than 30 days after the date of issuance, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown it is continued."

Under these sections plaintiff United could have filed an application for rehearing within 20 days after service of the letters upon it. If the applications for rehearing were denied or if the decisions on rehearing were adverse, plaintiff United could then have applied to the Supreme Court of the State of California for a writ of review.

Under its own theory of the case plaintiff United has failed to exhaust its administrative remedies and the orders have now become final.

We again refer this Court to the cases cited in paragraph II of the points and authorities in support of defendants' motion to dismiss which hold that plaintiffs are bound to exhaust the administrative remedies available to them as a condition precedent to seeking judicial relief.

In addition we also wish to refer this Court to the following cases which have not previously been cited:

Endicott Johnson Corp. v. *Perkins*, 317 U.S. 501, 87 L. ed. 424. *Tobin* v. *Banks & Rumbaugh*, January 14, 1953, —— C.A. 5, 21 Law Week 2353.

V

It is a matter of common knowledge and common sense that the defendant Commission would not institute an order

of investigation on its own motion unless it believed it had jurisdiction over the subject matter of the investigation. This, of course, does not mean that the Commission in such matter has prejudged the case and that the defendant will be foreclosed from raising the jurisdictional issue. Nevertheless, if in the course of the proceeding or on appeal it [fol. 110] is finally determined that the Commission does not have jurisdiction, defendant actually will have suffered injury only to the extent that he has spent time and money in defending himself. But he has not been deprived of property without due process of law nor has he sustained the type of injury which would have entitled him to equitable relief.

We are surprised to find such argument having been made by counsel for the Civil Aeronautics Board. Put the shoe on the other foot. Suppose United claimed that the transportation in question was intrastate rather than interstate and the Civil Aeronautics Board were seeking to require United to obtain a certificate of public convenience and necessity and file tariffs of its rates and charges. Would the Civil Aeronautics Board contend and would this Court hold that this Court in an application for an injunction should determine the jurisdictional question of whether the transportation were intrastate or interstate prior to the exhaustion of the administrative process. We think not.

In the *Tobin* case, cited in paragraph IV above, the Court of Appeals held in that Section 6(c) of the Administrative Procedure Act authorizing the court to enforce administrative subpoena to the extent it is "in accordance with law," does not require the court in a proceeding under the Fair Labor Standards Act seeking the enforcement of investigative subpoena to first determine that employment is covered. The employer had urged that the court should determine whether the employer and the subject matter to which the subpoena is directed are covered by the Act.

The Court of Appeals in following the rule laid down in *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, made the following appropriate statement:

> "To give effect to [the employer's] contention would, in most instances, sterilize the investigative

powers of the Administrator and force him to trial without the benefit of the very evidence which the subpoena is designed to secure. Refusal of the courts to refrain from adjudicating the issue of coverage in the enforcement proceeding would result in a maelstrom of confusion, for by their refusal to permit investigation, employers would be enabled to secure a [fol. 111] premature judgment on that issue and the very evil which Congress sought to overcome would prevail over the guardian appointed to correct it."

VI, VII, and VIII

In support of grounds 6, 7 and 8 of our motion for new trial we wish to incorporate by reference paragraph III of our Points and Authorities in Support of Motion to Dismiss. We have nothing further to add at this time.

IX

The Johnson Act, 28 U.S.C.A. 1342, provides as follows:

"1342. Rate orders of State agencies

"The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State. June 25, 1948, c. 646, 62 Stat. 932."

While we contend that the letters from the Commission Secretary to plaintiff United are not orders of the Commission, this Court appears to have held that such letters are orders. We therefore wish to point out that such

letters affect rates; they were sent after considering the contentions of plaintiff United; and, in our opinion, they in no way affect interstate commerce. This action is based on repugnance of the letters to the Federal Constitution, although there is an additional contention that the action is contrary to a Federal statute.

X

The record clearly shows that defendants have not sought to exercise jurisdiction over any aspect of plaintiffs Catalina operations other than rates and charges for services. The provisions of the Constitution of the State of California which defendants are presently seeking to enforce authorize defendants to regulate no other aspect of the [fol. 112] operation in question. Concerning aspects of plaintiffs Catalina operation other than rates and charges there clearly is no controversy and no threat of irreparable injury. The judgment of this Court should therefore be modified accordingly.

Conclusion

The judgment of this Court is far-reaching and significant in its effect on the proper functioning of administrative agencies and in its effect on the relationship between state and federal authority and particularly state and federal courts under our dual form of government.

In conclusion, it is respectfully submitted that reason and authority require that the defendant Commission be permitted to exhaust its administrative processes and to that end this Court should grant defendants' motion for a new trial.

Respectfully submitted, (S.) Everett C. McKeage, Chief Counsel; J. Thomason Phelps, Senior Counsel; Wilson E. Cline, Attorneys for Defendants, 514 State Building, San Francisco, California.

[fols. 113-114] Affidavit of Service by Mail.

(Omitted in printing)

[fol. 115] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENOR'S ANSWER TO DEFENDANTS' MOTION FOR NEW TRIAL—filed February 17, 1953

In their motion for a new trial, defendants place principal reliance upon the recent decision in *Public Service Commission of Utah* v. *Wycoff Company*, 344 U.S. 237 (December 22, 1952). That decision, according to the defendants, establishes "that plaintiffs herein are entitled to no relief in the Federal District Court because there exists an adequate remedy in the courts of the State of California for the purpose of reviewing any action already taken or that may be taken by the defendants herein pertaining to the subject-matter of the above-entitled action" (Paragraph 1 of Motion, p. 2).

We do not so interpret this decision. Irrespective of what the Court of Appeals may have had to say concerning the facts and pleadings of the *Utah* case (paragraph 1 of argument in support of motion, pp. 4, 5), the Supreme Court held that the case could not be maintained as an injunction action "because there is no proof of any threatened or probable act of the defendants which might cause the irreparable injury essential to equitable relief by injunction" (344 U.S. at p. 241). Neither could the case be maintained as an action for declaratory judgment, because it had not "taken on fixed and final shape so that [fol. 116] a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them" (344 U.S. at p. 244). The Court did not purport to limit the jurisdiction of the Federal Courts to grant injunctive relief in cases where irreparable injury is established, or to lay down any tests for establishing irreparable injury different from those heretofore established by applicable case law. Neither did it hold that Federal declaratory relief cannot be obtained in a proper case against a State regulatory agency.

The *Utah* case is characterized, and thus distinguished from the instant case, by at least the following factors:

(1) There was no proof of any *threatened* or *probable* act which might cause irreparable injury (344 U.S. at p. 241);

(2) The dispute had not matured to a point where the Court could determine that any concrete controversy would develop since no risk of suffering penalty, liability or prosecution had been demonstrated (344 U.S. at p. 245);

(3) The declaratory decree sought would not have ended the controversy, and further proceedings would have been required when the Commission undertook to impose specific regulatory requirements (344 U.S. at p. 246). There would then be need for evidence concerning the facts then existing (344 U.S. at p. 247), and the evaluation of that evidence, relating to operations unquestionably physically intrastate, obviously would best be left in the first instance to an agency expert in transportation problems;

[fol. 117] (4) There was no claim by the Interstate Commerce Commission, the Federal regulatory agency concerned, of any infringement of its jurisdiction.

In the present case, the plaintiffs have fully sustained the burden of showing both *threatened* and *probable* action which would cause irreparable injury. Complainants' testified to a direct threat of penalty actions, which threat was not actually denied by the defendants. The defendants in the past have caused penalty actions to be instituted against United for violations of regulatory requirements which occurred prior to the Commission's determination of jurisdiction, and this course of action demonstrates a strong possibility of probable similar action with respect to the Catalina controversy. Moreover, the defendants already have asserted, and continue to assert, that they have jurisdiction over the Catalina operations. They concede that they intend to require the plaintiffs to appear and defend in a proceeding before the Commission, which we think will be only an empty formality, and that the cost of defending such proceeding will exceed $3000 for which the plaintiffs will not be recompensed. Under these circum-

stances, the plaintiffs have demonstrated, and the Court has found, a clear need for equitable relief.

An actual controversy has developed between the parties, with the defendants contending that the State of California has regulatory jurisdiction over the Catalina operations as intrastate transportation, and the plaintiffs and intervenor contending that the operations are interstate and under the exclusive regulatory jurisdiction of the intervenor. The controversy is concrete with respect to tariffs and rate control over the operations. There is no uncertainty as to the claims of either side, or of the action which the Commission proposes. It cannot be contended [fol. 118] that the merits of the problem here involved are dependent upon a resolution of complicated facts within the peculiar competence of a regulatory body. The facts are not in dispute, and the questions presented are entirely questions of law. The Court's decree finally settles the controversy. The case meets all the prerequisites for declaratory relief.

We believe this case to be entirely controlled by cases such as *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218; *Bethlehem Steel Corp.* v. *N.Y. State Labor Relations Board*, 330 U.S. 767; *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456; and *Cloverleaf Co.* v. *Patterson*, 315 U.S. 169. These cases were not even cited in, and much less overruled by, the *Utah* case. In the *United Fuel* case, for example, the Court specifically adverted to the fact that the State Commission there involved "has not yet done more than assert its jurisdiction over United's rates" (317 U.S. at p. 465). It nevertheless upheld the granting of injunctive relief by the Federal Court, stating (317 U.S. at pp. 468 and 469):

> "Since these orders are invalid insofar as they impinge upon an authority which Congress has now vested solely in the Federal Power Commission, the decree below must stand unless we can fairly conclude that it was an abuse of discretion for the District Court to grant relief by way of injunction. It is perhaps unnecessary at this late date to repeat the admonition that the federal courts should be wary of interrupting the proceedings of state administrative

tribunals by use of the extraordinary writ of injunction. But this, too, is a rule of equity and not to be applied in blind disregard of fact. And what are the commanding circumstances of the present case? First, and most important, the orders of the state Commission are on their face plainly invalid. No inquiry beyond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal Act. If, therefore, United complies with these orders, it will be put to the expenditures incident to ascertaining the base for rate-fixing purposes—expenses which may ultimately be borne by the consuming public and which Congress, by conferring exclusive jurisdiction upon the federal regulatory agency, necessarily intended to avoid. If United does not comply with the orders, it runs the risk of incurring heavy fines and penalties or, at [fol. 119] the least, in provoking needless, wasteful litigation. In either event, enforcement of the Commission's orders would work injury not assessable in money damages, not only to the appellee but to the public interest which Congress deemed it wise to safeguard by enacting the Natural Gas Act. In these circumstances, we cannot set aside the decree of the District Court as an improper exercise of its equitable jurisdiction. *Petroleum Co.* v. *Public Service Commission*, 304 U.S. 209, was a very different case. There the regulation of intrastate rates alone was involved, no conflict between federal and state authorities was in issue, and the appeal to equity sought to anticipate the appropriate exhaustion of the administrative process."

The motion for new trial should be denied.

Respectfully submitted, Chauncey Tramutolo, United States Attorney for the Northern District of California; Charles Elmer Collett, Assistant United States Attorney for the Northern District of California; John H. Wanner, Associate General Counsel, Civil Aeronautics Board, Washington 25, D. C.; O. D. Ozment, Attorney, Civil Aeronautics Board, Washington 25, D. C., Attorneys for the Civil Aeronautics Board.

[fol. 120] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFFS' ANSWER TO DEFENDANTS' MOTION FOR NEW TRIAL—filed February 19, 1953

This case has been so thoroughly argued that we do not deem it necessary to present further argument to the court except for the reliance of defendants on the decision in *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U. S. 237. We feel that the *Utah* case is clearly distinguish-
[fol. 121] able from the case at bar in the following particulars:

1. The Court pointed out that before that action was commenced an action was commenced by the Commission in the state courts and that the plaintiffs then hurried to the federal courts to prevent a decision by the state courts in the matter. This is certainly quite different from the case at bar. Here the plaintiffs had been acting under the jurisdiction of the Civil Aeronautics Board ever since 1938, and during all of that period the state commission never brought any proceeding to have the matter determined in the state courts.

2. The Court pointed out the right of the state commission to first decide the matter, but in the case at bar the court has before it not only the state commission with its right to decide the matter but also has the Civil Aeronautics Board which has, as the administrator of the Federal Act, like power and right to decide the matter.

3. The Court, in the *Utah* case, pointed out that all that was asked was a decision on an abstract question as to whether a certain procedure involved interstate commerce; while in the case at bar the plaintiffs and intervenor both claim that the matter is in the exclusive jurisdiction of the Civil Aeronautics Board, and they ask both for declara-

tory judgment and an injunction against interference with such jurisdiction.

4. The Court pointed out that there was no evidence offered of any threatened action by the Utah Commission; whereas, in the case at bar it was pointed out that the state statute imposed penalties of $2000 per day, that the Commission contended that the penalties were applicable to air lines, and that the Commission had imposed penalties of $138,000 for 69 days' collection of a rate which had been held reasonable by the Commission, but which technically had not yet gone into effect.

[fol. 122] 5. The Court based its decision largely on the ground that the judicial power does not extend to abstract questions, which is not applicable here. The Court has held that the controversy must take on a definite form; here, we showed that the Commission, in writing, had ordered the plaintiffs to file their rates with the Commission.

6. The Court expressly held that in the *Utah* case there was no threat of any penalty; whereas in the case at bar a heavy penalty is prescribed by state law, according to the contentions of the Commission.

7. The Court also held that, in view of the limited nature of the relief sought, a decision would not settle anything; whereas in the case at bar the court has by its judgment definitely decided which party has jurisdiction over the route in question.

8. We have had an opportunity to see intervenor's answer to defendants' motion for a new trial and, in view of that answer, we think the foregoing is sufficient to entirely differentiate the case at bar from the *Utah* case. The defendants have had 15 years within which to seek a decision in the state courts. Even if the case at bar were dismissed, there is no assurance that an action would be brought in the state courts.

9. For the convenience of the court and counsel we here set forth in detail an analysis of the differences and distinctions between the case at bar and the *Utah* case:

Utah Case	*Catalina Case*
The complaint alleged "that carriage between points in Utah was so integrated with their interstate movements that the whole constituted interstate commerce." (94 Adv. L. Ed. 178)	The court found it to be a conclusion of law that the route in question was in and of itself an interstate route, irrespective of its connection or integration with any other interstate commerce. (Conclusions 5 and 6) And it was found to be a fact that the Civil Aeronautics Act controlled over interstate routes of this nature. (Finding 4)
[fol. 123]	
A portion of this case considers the legal requirements of a three-judge court. Outside of a recitation in the complaint, the constitutionality of any Utah statute or any commission order was never attacked. (p. 179)	It was found to be a fact that plaintiffs claimed the enforcement of certain California penalty statutes which may be applicable to air carriers would be so unreasonable and oppressive as to be a violation of the Fourteenth Amendment of the Constitution, and thus a substantial question was presented as to the validity of these statutes, which in and of itself necessitated the invoking of a three-judge court to resolve all issues presented by the plaintiffs. (Conclusion 3)
"The only issues defined on pretrial hearing were whether as matter of fact and of law the within-state transportation constituted interstate commerce." (p. 179)	The following issues were resolved: a) That the route was interstate; b) That the Civil Aeronautics Board had exclusive jurisdiction over the route (Conclusion 1);

Utah Case	*Catalina Case*
	c) That there was a threat of penalties by the Commission against plaintiffs (Conclusion 3);
	d) That these penalties would be excessive and burdensome on interstate commerce (Conclusion 3);
	e) That plaintiffs had no adequate remedy in the state courts.
"The trtal court, however, made a general finding that no such interference had been made or threatened * * *."	Trial court found as a matter of fact that these threats had been made (Finding 10) and that the Commission asserts jurisdiction over the route, in conflict with the Civil Aeronautics Board, and that the plaintiff would be put to an expense in excess of $3000 in defending itself in any proceeding before the Commission.
It was held that the complaint was "wanting in equity because there is no proof of any threatened or probable act of the defendants which might cause the irreparable injury essential to equitable relief by injunction." (p. 179)	There was direct testimony of a threatened action by the Chief Counsel of the Commission that said Commission would investigate the route and if it found that United had been collecting rates and fares which had not been filed with the Commission that Commission would institute actions to recover penalties from United. (Transcript p. 19)

[fol. 124] *Utah Case*

Plaintiff abandoned the complaint for injunctive relief "but seeks to support it as one for declaratory judgment, hoping thereby to avoid both the three-judge

Catalina Case

Furthermore, it was found that Commission advised United by letters of 9/20/51 and 12/27/51 that Commission had jurisdiction over the route and *directed* United to file its tariffs with the Commission. (Finding 10) Commission by its answer to the complaint and by direct testimony manifested an intent to investigate United's route and fare structure in the Catalina operation. It was found that United would incur legal expense in excess of $3000 in defending these proceedings and that there exists in California statutes which provide for penalties up to $2000 for violation of tariff regulations (Finding 11), and that in the past Commission has instigated penalty actions against United. The refusal of United to comply with Commission's directives regarding the route subjects United to the risk of incurring said penalties and to the cost of defending against said penalty suit. (Finding 13)

Neither the prayer for injunctive relief nor that for a declaratory judgment was abandoned, and in fact the court gave the requested relief in both instances. (Opin-

Utah Case	*Catalina Case*
court requirement and the necessity for proof of threatened injury." (p. 179)	ion of Court 12/3/52)
"Whether declaratory relief is appropriate under the circumstances of this case apparently was not considered by either of the courts below." (p. 179)	It was expressly found that an actual controversy, under the Declaratory Judgment Act (28 USCA, sec. 2201), existed between the parties concerning the question of "whether the plaintiff air carriers are to be regulated by the Public Utilities Commission of the State of California or by the Civil Aeronautics Board." (Conclusion 1)
[fol. 125]	
In regard to declaratory relief the *Utah* case set forth the postulate that "the conflicts of interest must be 'ripe for determination' as controversies over legal rights." The Court went on to say: "The complainant in this case does not request an adjudication that it has a right to do, or to have, anything in particular. It does not ask a judgment that the Commission is without power to enter any specific order or take any concrete regulatory step. It seeks simply to establish that, as presently conducted, respondent's carriage of goods between points within as well as without Utah is all interstate commerce." (p. 181)	Plaintiffs' complaint included the following in the prayer: a) Congress has preempted the complete control of the route; b) None of the penalties claimed by the Commission are valid; c) Declaratory relief from the above two; d) If the penalties are binding, they are invalid under the Fourteenth Amendment; e) Seeks an injunction preventing Commission from proceeding to collect the penalties.

Utah Case	*Catalina Case*
The record in the Utah case is silent as to the rights and immunities affected if these routes are not declared interstate commerce. The Court said in this regard that "We may surmise that the purpose to be served by a declaratory judgment is ultimately the same as respondent's explanation of the purposes of the injunction it originally asked, which is 'to *guard against the possibility* that said Commission would attempt to prevent respondent from operating under its certificate from the Interstate Commerce Commission.'"	There is no silent undeclared purpose in this case. The complaint, evidence, opinion and findings of fact and conclusions of law clearly and unequivocally set forth that henceforth this route be declared under the exclusive control and jurisdiction of the Civil Aeronautics Board and that the Commission be enjoined permanently from "in any manner, interfering with such paramount jurisdiction". (Opinion p. 5)
The Court said "that respondent and its predecessors in interest long made it a practice to obtain from the Utah Commission certificates to authorize this carriage of film commodities between points in Utah."	It was held to be a fact, and so found by the court, that "Tariffs for the carriage of persons and property were maintained on file with the Civil Aeronautics Board, and not with the defendant Public Utilities Commission, during all periods of operation by Wilmington-Catalina Airlines, Ltd. and its successor Catalina Air Transport; and operations were otherwise conducted under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board." (Finding 8)

[fol. 126] *Utah Case*

It was shown that the "Supreme Court of Utah * * * sustained the Commission in denying such an application upon a finding that the field already was adequately served." Also the Court noted that the Commission had filed a petition in "Utah state court to enjoin respondent from operating between a few specified locations within the State, but that process was never served."

In this connection, the Court said that "We may conjecture that respondent fears some form of administrative or judicial action to prohibit its service on routes wholly *within* the State, without the Commission's leave. What respondent asks is that it win any such case before it is commenced." (Emphasis added.) (p. 181)

"The carrier's idea seems to be that it can now establish the major premise of an exemption, *not as an incident of any present declaration of any specific right*

Catalina Case

There was no litigation pending, nor was there any existing administrative action concerning the route at the time the suit was commenced.

This case is distinguished, first, because it was found to be a fact that the route was over the high seas and was under the exclusive control and jurisdiction of Civil Aeronautics Board; and, second, that there is a conflict of interests between two administrative boards—one Federal and one State—which must be resolved by a court, else plaintiff United would obey the mandates of one at the peril of penalty by the other. (Findings 9 and 10)

Here it was found expressly to be a fact that if permitted by the court the Commission would institute proceedings before the Commission for the purpose of

Utah Case	*Catalina Case*
or immunity, **but to hold in readiness for use should the Commission at any future time attempt to apply any part of a complicated regulatory statute to it." (Emphasis added.) (p. 181)**	**asserting jurisdiction, to which proceeding plaintiffs will be made parties, and then, if United fails to file its tariffs after having been formally ordered to do so, penalty actions will be brought against United; that United does not admit that Commission has jurisdiction over the route; and that it would cost in excess of $3000 to defend itself in any such proceeding before the Commission. (Finding 11)**
[fol. 127]	
In stating that the facts are not such as to warrant declaratory relief, the Court said:	**The controversy here is mature. Two agencies claim jurisdiction, with the plaintiffs caught in the middle. The controversy involves prosecution for failure to obey rules and regulations of an administrative board no matter which way plaintiffs turn. The controversy involves excessive penalties if plaintiffs turn the wrong way. It also involves the outlay of large sums of money to defend against said penalty suits; said defense being at plaintiffs' peril, as statutory penalties accrue daily at the rate of $2000 per day.**
"In the first place, this dispute has not matured to a point where we can see what, if any, concrete controversy will develop. It is much like asking a declaration that the State has no power to enact legislation that may be under consideration but has not yet shaped up into an enactment. *If there is any risk of suffering penalty, liability or prosecution, which a declaration would avoid, it is not pointed out to us.*" (Emphasis added) (pp. 181, 182)	

Utah Case

The Court then had this to say:

"If and when the State Commission takes some action that raises an issue of its power, some further declaration would be necessary to any complete relief. The proposed decree can not end the controversy.

Nor is it apparent that the present proceeding would serve a useful purpose if at some future date the State undertakes regulation of respondent." (p. 182)

Catalina Case

In this case the State has acted. The Commission, through its secretary, has by letter directed plaintiff United to file tariffs. If United does not file tariffs, defendant Commission, by direct testimony, will institute proceedings against United, and the end result, by law, would be confiscatory penalties and huge legal expenses. (Findings 10 & 11)

Furthermore, the *Utah* case only asks that certain routes, entirely within the State of Utah, be declared interstate routes. There is no other request, and there is no suggestion as to what the result of this declaration would be.

In the *Catalina* case the declaration is that *"the Civil Aeronautics Board to have exclusive jurisdiction over the plaintiff in its operations in the described route"* (Emphasis added) and "permanently forbidding and enjoining the defendants from, in any manner, interfering with such paramount jurisdiction." This is positive and real relief, as opposed to the nebulous and uncertain relief requested in the *Utah* case.

[fol. 128] *Utah Case*	*Catalina Case*
The Court admitted that the remedy was not to be withheld because it necessitated weighing conflicting evidence or deciding issues of fact as well as law, "But when the request is not for ultimate determination of rights but for preliminary findings and conclusions intended to fortify the litigant against future regulation, it would be a rare case in which the relief should be granted."	Here the regulation is present, the Commission has stated unequivocally that it has jurisdiction over this route, and that it intends to exercise same, and has ordered United to comply with these regulations. Civil Aeronautics Board simultaneously claims jurisdiction over the same route. This is a present, existing controversy, ripe for settlement.
The Court said that the declaratory judgment procedure should "not be used to preempt and prejudice issues that are committed for initial decision to an administrative body or special tribunal * * *."	Here Congress has expressly preempted the field from state regulation. (Finding 4) There is nothing for the State Commission to regulate, yet the Commission persists in forcing United to file its tariffs. This is not something which could be construed as interstate commerce by applying the "substantial burden test", it is interstate commerce as defined by the Laws of Congress, subject to Federal regulation only, and to this end declaratory relief is properly requested. (Finding 4)
The Court said that the "carrier, being in some disagreement with the State Commission, rushed into federal court to get a decla-	This case is not for the purpose of interpreting a state statute. We know how the State Commission has interpreted it because the

Utah Case

ration which either is intended in ways not disclosed to tie the Commission's hands before it can act or it has no purpose at all.

* * *

It is the state courts which have the first and the last word as to the meanings of state statutes and whether a particular order is within the legislative terms * * *." (p. 182)

[fol. 129]

"Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be res judicata, so that the Commission can not hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights." (pp. 182, 183)

Catalina Case

Commission has ordered United to abide by its terms and file the tariffs. The statute we are concerned with is the Federal Civil Aeronautics Act, (49 USCA, sec. 401, et seq.) which entirely preempts the route in question from State control. This is the subject for which declaratory relief was asked and received. (Finding 4; Conclusion 6; Opinion 12/3/52).

This is not anticipatory judgment, but enforcement of the mandate of Congress that the Civil Aeronautics Board, and the Civil Aeronautics Board alone, shall be the regulatory body over this route. The State Commission has already ordered United to obey its regulatory order. Here United seeks judicial advice, whether it should obey Congress or the State Commission. No matter which way plaintiff United acts, there is punitive retaliation; therefore a declaration of paramount authority was asked for and received. There is nothing for the State Commission to decide, because it has no authority to decide anything or regulate anything in respect to this route. (Finding

Utah Case	*Catalina Case*
	4, Conclusion 6, Opinion 12/3/52)
The Court was concerned about the orderly procedure for protection of litigants who have been denied federal rights, and remarked that "Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.	We are not here to determine rights or set up defenses in state courts. We are here to find out who has the paramount authority over the route in question. The court has found that the Federal Government has this right. The mere fact that defendant Commission is disputing this decision shows a controversy between two regulatory bodies.
In this case * * * The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted." (p. 183)	
The Court put the issue correctly when it said "If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim." (p. 183)	This case directly concerns the claim under Federal Law that the route in question is a Federal route, not subject to State control.

[fol. 130] *Utah Case*	*Catalina Case*
The Court stated that since this case was to be "dismissed in any event, it is not necessary to determine whether, on this record, the alleged controversy over an action that may be begun in state court would be maintainable under the head of federal-question jurisdiction."	There is no doubt that a substantial federal question exists in determining the paramount jurisdiction of an air route over the high seas, when Congress asserts control in one instance, and the Public Utilities Commission asserts control in another.

We respectfully submit that the motion for a new trial should be denied.

Treadwell & Laughlin, Edward F. Treadwell, Reginald S. Laughlin, Mayer, Meyer, Austrian & Platt, John T. Lorch, Attorneys for Plaintiffs.

[fol. 131] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION FOR A NEW TRIAL—filed February 20, 1953

Defendants' motion for a new trial herein was argued and submitted. Upon the argument and in the briefs submitted, counsel for defendants cited the case of Public Service Commission of Utah v. Wycoff Company, 344 U.S. 237, decided December 22, 1952. We find the cited case to be plainly distinguishable here. The motion for a new trial is denied.

Dated: February 20, 1953.

Wm. E. Orr, United States Circuit Judge; E. P. Murphy, United States District Judge; Louis E. Goodman, United States District Judge.

[fol. 132] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

Before: Hon. William E. Orr, Circuit Judge, Hon. Louis E. Goodman, District Judge, Hon. Edward P. Murphy, District Judge.

PETITION FOR APPEAL—filed March 27, 1953

Considering themselves aggrieved by the final decree and judgment of this Court entered on January 28, 1953, the Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of [fol. 133] and Collectively Constituting the Public Utilities Commission of the State of California, Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public Utilities Commission of the State of California, defendants herein, do hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said defendants, and that the amount of security be fixed by the order allowing the appeal, and that the material parts of the record, proceedings and papers upon which said final judgment and decree was based duly authenticated be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Dated March 27, 1953.

Respectfully submitted, (S.) Everett C. McKeage, Chief Counsel; J. Thomason Phelps, Senior Counsel; Wilson E. Cline, Attorneys for Defendants-Appellants, 514 State Building, San Francisco 2, California.

[fol. 134] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—filed March 27, 1953

The Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public Utilities [fol. 135] Commission of the State of California, defendants herein, having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this Court in this cause entered on January 28, 1953, and from each and every part thereof, and having presented their assignment of errors and prayer for reversal and their statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $500.00, with good and sufficient surety, and shall be conditioned as may be required by law.

It is further ordered that citation shall issue in accordance with law.

It is further ordered that the Clerk of this Court transmit the material parts of the record as required and in the manner provided by Rule 10 of the Rules of the Supreme Court of the United States.

Dated March 27th, 1953.

(S.) Louis E. Goodman, District Judge.

[fols. 136-137] Citation in usual form showing service on Treadwell & Laughlin, Chauncey Tramutolo et al omitted in printing.

[fol. 138] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—filed March 27, 1953

The Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Evertt C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public [fol. 139] Utilities Commission of the State of California, defendants in the above-entitled case, in connection with their appeal to the Supreme Court of the United States, hereby file the following assignment of errors upon which they will rely in their prosecution of said appeal from the final judgment of the District Court entered against them on January 28, 1953.

The Three-Judge District Court erred:

1. In finding that aircraft flying between Avalon and Wilmington were required to fly over approximately 24 miles of water not within the boundaries of the State of California.

2. In finding that the tariffs and operations of Wilmington-Catalina Airlines, Ltd., and its successor Catalina Air Transport, and of United Air Lines have been and are being conducted under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board.

3. In finding that the statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day that operations are conducted by carriers without effective tariffs being on file with the defend-

ant Commission and in finding that defendants in the past have asserted that these statutory penalties are applicable to air carriers, and have caused proceedings to be instituted in the California Courts for the recovery of these penalties against various air carriers, including defendant United.

4. In finding that the refusal of the plaintiff United to comply with directives of the defendant Commission to file tariffs, and any refusal to comply with any future such directive, has subjected and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for recovery of penalties.

5. In concluding that the District Court has jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1337, and 28 U.S.C. 2201.

6. In concluding that the Civil Aeronautics Board is entitled to seek and obtain a ruling as to its powers and juris- [fol. 140] diction as a plaintiff-intervenor in this case, and to obtain declaratory and injunctive relief against any interference by the defendants with its jurisdiction.

7. In concluding that plaintiffs raised a substantial Federal question concerning the constitutionality of the penalty provisions contained in Section 2107 of the California Public Utilities Code and that this Three-Judge District Court was properly convened.

8. In concluding that the institution of an investigation proceeding before defendant Commission would subject plaintiff and possibly the public to irreparable injury and would constitute a burden on interstate commerce and an interference with the jurisdiction of the Civil Aeronautics Board.

9. In concluding that the threat of institution of an investigation proceeding, the risks and expenditures to which plaintiff may be subjected as a result of possible penalty actions, and the actual controversy which exists between the parties are such as to entitle both the plaintiffs and the intervenor to declaratory relief and injunctive relief.

10. In concluding that plaintiffs have no plain, speedy, and efficient remedy in the Courts of the State of California, or otherwise, than by this action.

11. In concluding that the matter in issue concerns the reach of a Federal statute which conflicts with the claims of the defendants regarding state law.

12. In concluding that this Three-Judge District Court should decide the issues tendered irrespective of the existence or adequacy of any state court remedies.

13. In concluding and holding that the intervening waters between the three-mile marginal belts along the coastline of the mainland of the State of California and surrounding Santa Catalina Island are wholly outside the territory and jurisdiction of the State of California, and that aircraft passing over these intervening waters are passing through air space over a place outside of the State of California.

14. In concluding that Congress through the adoption of [fol. 141] the Civil Aeronautics Act of 1938 has declared therein that all common carrier transportation by aircraft between places in the same State when that transportation involves passage through or over territory or waters outside the State constitutes interstate air transportation.

15. In concluding that plaintiffs' operations between Santa Catalina Island and the mainland of the State of California constitute interstate air transportation as defined by the Civil Aeronautics Act of 1938, and that the powers conferred upon and exercised by the Civil Aeronautics Board leave no room for State regulation of these operations.

16. In concluding that the plaintiffs and the intervenor are entitled to a decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the plaintiffs in their operations between the mainland of California and Santa Catalina Island, and permanently forbidding and enjoining defendants from in any manner, interfering with such exclusive jurisdiction.

17. In ordering, adjudging, and decreeing that the Civil Aeronautics Board has exclusive jurisdiction over the plaintiffs in their operations over the route described in the complaint, and the defendants have no jurisdiction or power of regulation over the same.

18. In permanently prohibiting and enjoining defendants and their employees, agents, and attorneys, and all persons claiming by, through or under them, from in any manner

interfering with the exclusive jurisdiction of the Civil Aeronautics Board over the plaintiffs in their operations over the route described in the complaint, or from in any way controlling or regulating said route.

19. In failing to find and conclude that no actual case or controversy such as will entitle plaintiffs and intervenor to the relief requested in the Federal District Court exists.

20. In failing to find and conclude that plaintiffs are subject to no threat of irreparable injury, which will entitle them to the relief requested in the Federal District Court.

21. In failing to find and conclude that plaintiffs have [fol. 142] failed to raise a substantial Federal question concerning the constitutionality of the penalty provisions contained in Section 2107 of the California Public Utilities Code and in failing to dissolve the Three-Judge District Court because of plaintiffs' failure to raise such substantial Federal constitutional question.

22. In failing to find and conclude that the administrative processes of defendant Commission and the administrative remedies available to plaintiffs and intervenor have not been exhausted and, therefore, plaintiffs and intervenor are not entitled to the relief requested in their respective complaints, and that said Court had no jurisdiction to entertain the same.

23. In failing to find and conclude that the plaintiffs have a plain, speedy, and efficient remedy before defendant Commission and the courts of the State of California and, therefore, the plaintiffs and intervenor are not entitled to the relief requested in their respective complaints.

24. In failing to find and conclude that the waters between the California mainland and Santa Catalina Island are not a place outside the State of California within the meaning of the definition of interstate air transportation as set forth in the Civil Aeronautics Act of 1938.

25. In failing to find and conclude that air transportation between the California mainland and Santa Catalina Island is not interstate air transportation within the meaning of the Civil Aeronautics Act of 1938.

26. In failing to find and conclude that Congress through the adoption of the Civil Aeronautics Act of 1938 has not preempted the field of regulation of air transportation be-

tween places in the State of California when that transportation involves passage through the air space over the high seas.

27. In failing to conclude that the Johnson Act, 28 U.S.C.A. 1342, precludes this Three-Judge District Court from issuing an injunction restraining defendant Commission from issuing directives and orders affecting the rates in question.

28. In failing to dissolve the temporary injunction outstanding against defendants and in failing to dismiss the complaint of plaintiffs and the complaint [fol. 143] of intervenor on file herein.

Wherefore, defendants, Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public Utilities Commission of the State of California, pray that the final decree of the District Court be reversed, and for such other relief as the Court may deem fit and proper.

(S.) Everett C. McKeage, Chief Counsel; J. Thomason Phelps, Senior Counsel; Wilson E. Cline, Attorneys for Defendants-Appellants, 514 State Building, San Francisco 2, California.

[fols. 144-196] Statement Required by Paragraph 2, Rule 12 of the Rules of the Supreme Court of the United States (omitted in printing)

[fols. 197-198] Bond on appeal for $500.00 approved and filed March 27, 1953 omitted in printing.

[fols. 199-228] Appellants' Praecipe (omitted in printing)

[fols. 229-230] Appellants' Praecipe (omitted in printing)

[fol. 231] In United States District Court

[Title omitted]

Transcript of Proceedings on Motion for Preliminary Injunction, Motion to Dismiss and Motion to Intervene—Friday, August 8, 1952.

Appearances:

For Plaintiffs: Messrs. Treadwell & Laughlin, by Reginald S. Laughlin, Esq., Edward F. Treadwell, Esq., and Colin C. Kelley, Esq.

For Defendants: Hon. Edmund G. Brown, Attorney General of the State of California, by Richard H. Perry, Deputy Attorney General.

For Intervenors: J. T. Phelps, Esq., O. D. Ozment, Esq., C. Elmer Collett, Esq.

[fol. 232] Colloquy Between Court and Counsel

The Clerk: United Airlines vs. Public Utilities Commission of the State of California, et al. Complaint for declaratory relief and injunction, motion to dismiss, motion for leave to intervene, hearing before a three-judge court composed of Hon. Judges William E. Orr, Edward P. Murphy, and Louis E. Goodman.

Will respective counsel please state their appearances for the record?

Mr. Treadwell: Edward F. Treadwell, for the plaintiffs.

The Clerk: Any other counsel representing the plaintiffs present?

Mr. Treadwell: Mr. Kelley is with me, and my partner, Mr. Laughlin.

The Clerk: Counsel for Intervenors?

Mr. Collett: If the Court please, may I introduce to the Court Mr. O. D. Ozment, of the General Counsel's office of the Civil Aeronautics Board, who is admitted to the District Court, District of Columbia; to the Supreme Court of the United States; and the Court of Appeals for the Ninth Circuit, who will appear on behalf of the Intervenors, the Civil Aeronautics Board.

The Clerk: Counsel for the defendants?

Mr. Phelps: I am J. T. Phelps. I appear on behalf of [fol. 233] the defendants except Edmund G. Brown, the Attorney General of the State of California.

Mr. Perry: Richard H. Perry, Deputy Attorney General, appearing solely for the Hon. Edmund G. Brown, Attorney General of the State of California.

Judge Orr: I suppose the first matter you want to present, gentlemen, will be the motions to dismiss. We will hear you on the motions to dismiss.

Mr. Collett: If the Court please, may I suggest the motion on behalf of the intervenor be considered by the Court first?

Judge Orr: If the motion to dismiss is upheld, there will be no reason for intervention, and I think we better determine the question of dismissal first.

Did you want to be heard on that motion to dismiss?

Mr. Ozment: I understand there will be no objection to our intervention in the case.

Judge Orr: If there will be no objection, the order may be entered. You may appear for that purpose.

Mr. Perry: If it please the Court, I must challenge counsel's statement. We are waiving absolutely no objections at this time, and if the Attorney General is held to answer, the Attorney General has not consented to the intervention.

Mr. Ozment: I am sorry, Your Honor; I was misinformed. I was under the impression there would be no [fol. 234] objection. I would like to be heard as to——

Judge Orr: We will hear you amicus.

Mr. Treadwell: If Your Honors please, possibly it might be that Your Honors would like to make some arrangement in regard to briefs. The present situation is this, Your Honors, we on behalf of plaintiffs have prepared and are ready to deliver to the Court the brief on behalf of the plaintiffs. This morning, however, the defendants filed briefs which we had not seen before, and I don't know whether they wish leave to file further briefs or not. But if they do, we would like to have the right to reply to any briefs filed today.

Judge Orr: Do you want to submit this matter on oral argument, the motion?

Mr. Treadwell: Well now, we feel the briefs are necessary. It is too complicated to cover entirely in oral argu-

ment. We think oral argument would be very valuable to the Court.

Judge Orr: We might suggest, Mr. Treadwell, that we hear your oral argument. If we then determine that briefs are necessary, we will so advise you.

Mr. Treadwell: I think that is a good idea.

Judge Orr: We will hear, I suppose, which of you gentlemen—which of you gentlemen want to argue?

Mr. Perry: If it please the Court, the Attorney General [fol. 235] will defer to the Public Utilities Commission at this time in that their motion goes to the merits of the case, and of course, ours then would be ancillary should their motion be sustained.

Judge Orr: We will hear you then.

Mr. Phelps: May it please the Court, I understand in accordance with Your Honors' direction that we are to address ourselves at the present time to the grounds of defendants' motion to dismiss.

Judge Orr: I suppose that is the only thing before us, isn't it? There is no answer here or anything of that kind. About the only thing before us at this time is the motion to dismiss.

Mr. Phelps: My view has been that there was also present and before the Court the plaintiffs' application for a temporary injunction pendente lite and that was one of the two issues present and before the Court this morning.

Mr. Treadwell: It is not entirely clear to us, Your Honors, that we shouldn't have the opening, because the question on the temporary injunction presents the whole case.

Judge Orr: Supposing we are confronted after this argument with a motion to dismiss. Then there would be no question of any temporary injunction or any other proceeding.

Mr. Treadwell: That is right.

[fol. 236] Judge Orr: I thought perhaps the first thing we would have to get out of the way is this motion to dismiss.

Mr. Treadwell: Any way, any way that Your Honor wishes to present it. It just kind of seems to me that you

couldn't present a motion to dismiss without arguing the entire case, and I think that is what their argument will be.

Judge Orr: It may reach those proportions. It is just a matter of proceeding that we are now confronted with.

Mr. Phelps: I have prepared, Your Honor, a memorandum of points and authorities in support of this motion to strike. I am prepared to make it available to the Court now—that is, if you wish, or I shall defer it.

Judge Orr: It may be helpful in assisting us in following your argument.

Mr. Phelps: I think it may be helpful to make it available now.

ARGUMENT BY MR. PHELPS FOR DEFENDANTS OTHER THAN ATTORNEY GENERAL OF CALIFORNIA

The defendants whom I represent, if the Court please, have set out in their motion to dismiss three grounds upon which it is our position this complaint should be dismissed. The first ground states that the action should be dismissed because this Court lacks jurisdiction of the subject matter for the reason that there exists an adequate remedy in the courts of the State of California for the purpose of reviewing any action that may be taken by the Public Utilities Commission of the State of California or its attorneys or [fol. 237] representatives to enforce any penalties that may be provided by the laws of the State of California, or to enforce compliance with any order of said Utilities Commission pertaining to the subject matter of the above entitled action.

It was our purpose in stating that ground to rely upon the authority of two cases decided by the Supreme Court of the United States. They were related matters and they are contained in Alabama Public Service Commission vs. Southern Railway, and Alabama—the same two parties in both cases, the first citation being 341 US 363, and the second one being at 341 US 341. In that case the Southern Railway had applied to the Public Service Commission of the State of Alabama requesting permission to discontinue

certain local runs by its trains in the State of Alabama. The reasons for the application were those two lines were losing money, operating at deficits, and were therefore a burden upon interstate commerce.

The Public Service Commission of the State of Alabama declined to authorize the abandonment of those two runs, those two trains. Whereupon the railroad filed an action in the District Court, United States District Court in Alabama, requesting that the Public Service Commission of Alabama be restrained from enforcing certain penalty actions that were provided for by the statutes of the State of [fol. 238] Alabama.

So far the two matters are on all fours, it is precisely what the plaintiffs allege what these defendants do here.

The District Court granted the injunction and upon appeal to the Supreme Court of the United States that ruling was reversed. The Supreme Court of the United States held that there being an adequate remedy in the courts of the State of Alabama that the Federal courts should not exercise their jurisdiction, if there was such jurisdiction. The court was not altogether clear, not perfectly clear, may I say, on the question of whether or not the Federal court had jurisdiction. But it took the position that assuming that it did have jurisdiction, such jurisdiction should not be exercised. They referred to a matter of comity, that it was undesirable for the Federal court to interfere in a matter of this kind when the plaintiff had a perfectly adequate remedy in the courts of the State, and by pursuing its remedies through the hierarchy of courts in the State they could ultimately obtain review of the matters involved by the Supreme Court of the United States.

And so the injunction that was issued in that case was reversed, vacated.

It is our contention that this case is virtually identical with that one. Here we have a plaintiff, two plaintiffs, alleging that a regulatory body of the State of California [fol. 239] has threatened to commence penalty actions in the courts of the State of California. They allege that there is no adequate remedy available to them in the courts of the State of California and they seek the injunctive relief of this Court together with declaratory relief re-

questing that this Court adjudicate and adjudge that the Public Utilities Commission has no jurisdiction over this flight of aircraft from Los Angeles to Santa Catalina Island.

This Court, however, can take judicial notice of the fact that there exists in the State of California a system of courts, and I refer particularly to Article VI, Sections 1, 4, 4(a), (b) and (c) of the California Constitution. Those references do not appear in our briefs, Your Honor.

Judge Orr: They do not?

Mr. Phelps: They do not, no. It is Article VI, Sections 1, 4, 4(a), 4(b) and 4(c) of the California Constitution. In those sections will be found provisions creating the judicial department of the State of California, from the Superior Courts through the District Courts of Appeal and the Supreme Court.

We have cited in our brief the cases. I refer now to page 7, line 21, the case of Wilmington Transportation Company vs. Railroad Commission 236 US 151. That case is an example of the manner in which a public utility or a public transportation company can obtain judicial review of any [fol. 240] decision entered, or any rule or regulation promulgated by the Public Utilities Commission of the State of California.

The other case I have in mind appears at page 4 at line 22. The plaintiff, United Air Lines, one of the two plaintiffs involved here, has already been to the United States Supreme Court, having taken along with it the Public Utilities Commission, for the purpose of determining whether or not the Commission had jurisdiction over the intra-state affairs of United Air Lines. It was finally determined that the Commission did have such jurisdiction. I cite that case at this point for the purpose only of showing that the method is afforded for these plaintiffs to reach the United States Supreme Court for the purpose of reviewing any action that may be taken by the Public Utilities Commission.

Having that in mind, I refer once more to the cases I first cited, the Alabama Public Service Commission cases, to the effect that where such remedies are provided by the State that the Federal courts should not interfere or restrain the action of the local regulatory body.

Judge Goodman: Does the complaint in this case allege any grounds for equitable relief, that is, irreparable damage of any kind?

Mr. Phelps: Yes, sir, Your Honor, it does.

Judge Goodman: What is the nature of that allegation? Does that allege any facts that constitute the kind of [fol. 241] irreparable damage that would warrant a position of equity?

Mr. Phelps: I will be glad to answer that now, if Your Honor chooses. I had thought I would address myself to that question when the Court considered the question of whether or not the temporary injunction should be granted. But I will answer it now.

Judge Goodman: No, I am thinking of it in the terms of a motion to dismiss, whether or not the complaint sets forth a cause of action for equitable relief by a court convened under the provision of the Federal statute that is here pronounced.

Mr. Phelps: The complaint, Your Honor, does contain allegations of irreparable damage to these plaintiffs in the event that this Court does not intervene. The irreparable damage is variously stated, and I shall have more to say about it later. In substance it is alleged that the defendants have threatened to bring numerous penalty actions against these plaintiffs in various courts of the State, that they have claimed that they have authority to wait until penalties in the sum of $2,000 per day had accumulated to the extent of millions of dollars and that the defendants have asserted that the plaintiffs and all of their employees are subject to criminal prosecutions—I think it being intended to imply that the defendants have threatened to bring such criminal actions.

[fol. 242] Judge Goodman: Well, of course, the bringing of a multiplicity of suits is not within the—what is known as irreparable damage. What I mean, you have to defend more than one suit.

Mr. Phelps: I agree, Your Honor.

Judge Goodman: But I am trying to find out what it is in the complaint, what irreparable damage is alleged in the complaint. I take it from what you just said and from the authorities you cited that you are contending that the

motion to dismiss should be granted because of the fact that there is no sufficient allegation that would warrant the Federal court to intervene.

Mr. Phelps: Well, a part of our position, Your Honor, most certainly is that there is no irreparable damage here that will follow to this plaintiff in the event that this Court denies relief.

Judge Orr: The accumulation of penalties of two thousand a day would amount to irreparable damage eventually, wouldn't it, if that were true?

Mr. Phelps: There is a one-year statute of limitations, Your Honor, prohibiting the bringing of actions for penalties after one year from the time.

Judge Orr: Would that mean a penalty which might—or continuing offenses each day that they operate without this——

Mr. Phelps: That is correct, the statute so provides.

[fol. 243] Judge Orr: The one-year statute, a violation a day, it would be a continuous procession of violations which the statute of limitations would effect one year from now, is that the idea?

Mr. Phelps: Yes, Your Honor.

Judge Orr: So that by the time the first statute of limitations ran, why, a rather sizeable amount of money in the way of penalties would have accrued.

Mr. Phelps: That is true, Your Honor, assuming the amount granted was the maximum of $2,000. The statute does not fix $2,000 as the only sum. There is a range of $500 per day to $2,000.

Judge Orr: The allegation of the complaint is that it is $2,000.

Mr. Phelps: Yes.

Judge Orr: On your motion to dismiss is that to be taken as true?

Mr. Phelps: No, indeed, Your Honor, and that is one point I wish to comment upon. We do not wish in any sense for our motion to *be* dismiss to be considered in the nature of a demurrer. On the contrary, if these defendants, whom I represent, should be called upon to answer this complaint, which I hope they will not, we will most vigor-

ously deny most of the allegations contained in this complaint.

Judge Orr: Well, I know. It isn't a question of what [fol. 244] you want. It is a question of what the legal effect of your motion to dismiss is. Does that have the effect of admitting all of the allegations pleaded?

Mr. Phelps: I submit, Your Honor, it does not.

Judge Orr: You may proceed.

Mr. Phelps: Have I answered your question sufficiently, Judge Goodman?

Judge Goodman: Well, it is not quite clear to me yet. I am not aware of the extent, the limits of the proceeding under this statute under which this three judge court is summoned. It isn't enough merely to allege that a statute is sought to be enforced that is unconstitutional. That does not alone give the right to proceed here. An equitable showing must also be made, because a statute may be unconstitutional and admittedly so, still no right of action exists, or at least in a three judge court, unless an equitable showing is made.

Mr. Phelps: I agree entirely.

Judge Goodman: Because the unconstitutional point, the point of unconstitutionality, may be urged in a legal proceeding as well as in an equitable proceeding. Therefore, the most important thing is, I think, overlooked frequently in these cases, that there must be an allegation that justifies equitable relief by way of injunction.

Mr. Phelps: I agree entirely.

[fol. 245] Judge Goodman: That is prompted my inquiry as to whether or not at this stage of the proceeding with the motion to dismiss before this court as to whether or not there is or is not a sufficient allegation upon which the plea for an injunction may be sustained.

Mr. Phelps: Well, I am forced to say, Your Honor, that the complaint on its face does not contain allegations of the nature I have described. Certainly not——

Judge Goodman: Of course, the complaint says that the plaintiff will suffer irreparable damage. But out of the facts, it seems to me that the important question on the motion to dismiss is whether the facts alleged in the complaint are sufficient to show irreparable damage. That

I think is really, in my opinion, the most important question on the motion to dismiss. The mere fact that there is an allegation that there will be a multiplicity of suits in itself is not any basis in an application for injunction to a three judge court for an injunction, because if there is adequate relief that can be afforded at law, whether it is one suit or more than one suit, it seems to me that would be a primary consideration. So the question as to whether or not the mere fact the defendant will be sued for money, that is, the plaintiff will be sued for money penalty, is not in itself possibly a sufficient allegation of irreparable damage. Most of the cases in that field are cases where [fol. 246] property is about to be taken and where the injunction is sought because there will be irreparable damage because of the taking of property. But a mere suit for money can be defended as well as any other suit.

What is the element of the irreparable damage? That is what has appealed to me as being the most important consideration on a motion to dismiss.

Mr. Phelps: Well, I cannot say, Your Honor, what the further considerations are that would justify the granting of this equitable relief. I don't think they exist myself. I assume the plaintiff will have something further to say about that.

Now perhaps I don't understand you clearly, Your Honor. I don't believe that you intended to say that the defendants have the burden of showing——

Judge Goodman: Oh, no. I think that some of the argument that you made and the cases which you cite really go to the merits as to whether or not the state and federal government has jurisdiction here. It is not involved in the motion to dismiss. The motion to dismiss only really goes to whether or not there is a sufficient showing in the complaint to warrant the three judge court acting in equity. That is all I was directing your attention to, to see what your argument was on the motion to dismiss in that regard.

Mr. Phelps: Well, I think, Your Honor, that it will [fol. 247] appear that there is no ground for equitable relief here and that therefore the principle of the cases I have just cited is applicable, namely, to the effect that the Federal District Courts do not entertain an action of this kind

to restrain or interfere with the exercise of the regulatory power of the Commission.

The second ground set out by these defendants in their motion to dismiss is the ground that the plaintiffs have not exhausted their administrative remedy which is available to them for the purpose of correcting any erroneous order that may be issued by said Public Utilities Commission pertaining to the subject matter of the above entitled action.

That ground was set out to take care of the possibility that the complaint might be construed or interpreted to allege that the defendant Commission was contemplating the taking of certain administrative action as distinguished from an action commenced in the courts to enforce penalties. For example, the complaint refers on page 6, commencing at line 23, that the defendants claim that the Public Utilities Act authorized the defendants to bring numerous suits for so-called reparations. I am not sure just what that is intended to say. But it is true that the Public Utilities Act enacted by the Legislature of the State of California empowers the Commission to hear and de- [fol. 248] termine suits for reparation, and it was in view of the possibility that it was that kind of action which these plaintiffs were seeking to restrain, in addition to the other kind of action, that we set out as ground number two the fact that if that is comprehended in the complaint they have not exhausted their administrative remedy.

And there are cases cited in our brief to support the proposition——

Judge Orr: Before the California Commission, you mean?

Mr. Phelps: Yes, Your Honor.

Judge Orr: Why would they be required to do that, if the California Commission has no jurisdiction?

Mr. Phelps: If it be assumed at the outset the Commission has no jurisdiction, I suppose the answer is: there is no reason.

Judge Orr: I suppose that is one of the things upon which this is based, that they have no jurisdiction.

Mr. Phelps: That is correct. I think I need not comment further upon the second ground, standing upon the cases cited in our brief for that proposition.

The third ground is far more reaching, and it is here that we have attempted to maintain that this action should be dismissed because on the merits this court has no jurisdiction for the reason that the subject matter, namely, this flight from Los Angeles to Santa Catalina Island is within [fol. 249] the jurisdiction of the State of California and not of the Civil Aeronautics Board.

That is a complex matter, Your Honors. The act of Congress which is involved here is a complex piece of legislation. It requires the reading of a good part of that statute to understand the full import. Our position is, and I think I better state this part of my argument by referring to the pertinent language of the Civil Aeronautics Act. A portion of it is set out in the complaint on page 4, commencing at line 2. The Act to which I refer is contained in 49 US Code Annotated at Sections 401 et seq. There are numerous provisions. It is a comprehensive piece of legislation. It is our position that the Congress in enacting that statute, among other things, had two distinct matters in mind. One of them was the desirability and the necessity of regulating the navigation and the safety of aircraft flying within boundaries of the United States and over water to other countries and to its territories, but it was focusing its attention at this point upon safety and navigation.

A second aspect, which we maintain Congress considered as part of the subject matter, was transportation, and Congress handled in quite two different ways. In the case of the former, navigation and safety, it was considered important, if not imperative, that the Civil Aeronautics [fol. 250] Board be given complete jurisdiction over the entire field in order to secure uniformity of regulations. That is quite understandable in the case of safety and navigation. But for purposes of transportation by aircraft, both of passengers and property, I think it will appear from a careful reading of this Act Congress was careful to leave to the states the regulation of the affairs for the intrastate operations of aircraft.

That was the position that the Commission maintained formerly, a position which was reviewed by the Supreme Court of the State of California and ultimately by the

Supreme Court of the United States, and that is the view that was affirmed by that decision in the case which — have already referred to, and which is cited in page 4 of our brief involving one of these very plaintiffs, United Air Lines.

So it is our position that there can be no longer any doubt whatever that the Civil Aeronautics Act has left to the states jurisdiction over intrastate operations of aircraft for the purposes of regulating and fixing fares and some other matters—for the present purpose, fares.

Judge Orr: What else do they allege that you are trying to do other than that, if anything, other than the regulation—fixing and regulation of fares?

Mr. Phelps: I think, your Honor, I am correct in saying that there is nothing beyond that at the present time, that [fol. 251] the criticism of the plaintiffs of the Commission is that the Commission is seeking in effect to regulate fares for this run from Los Angeles to Santa Catalina Island.

Judge Orr: And you say that the United States Supreme Court has said that the State of California has the right to do that?

Mr. Phelps: Yes, your Honor.

Judge Orr: What are we left here with then?

Mr. Phelps: If I may go on, Your Honor, I think I can make it clear what I have in mind. The subject matter involved in the litigation which I have described and which culminated in the United States Supreme Court involved flights of aircraft between Los Angeles and San Francisco. That was considered, as I say, Intrastate and the Commission was given full authority to regulate those fares. Now we have this question coming up in this proceeding involving the flight of aircraft from Los Angeles to Santa Catalina Island over the waters intervening between those two points, and it is the position of the plaintiffs, as I understand it, that that makes the case different from the case that has been decided by the Supreme Court, and they rely upon certain language contained in the Civil Aeronautics Act, a portion of which is set out on page 4 of the complaint. They have cited several sections of the Civil Aeronautics Act, several of which I maintain are not material.

[fol. 252] For example, Section 49 USCA, Section 401, subsection 20(a) "Defines interstate, overseas and foreign air commerce to mean" certain things—I am referring now to line 7, page 4 of the complaint. I think a reading of the Act will disclose that in using the word "commerce" Congress was referring to this deal of the regulation of safety in navigation to which I have already referred and that the pertinent language is to be found in Section 49 USCA Section 401 subsection 21(a), which commences at line 11 of the complaint, and which defines interstate, overseas, and foreign air transportation to mean the carriage by aircraft of persons or property between places in the same state of the United States through the airspace over any place outside thereof.

It is the position of the plaintiffs, as I understand it, that a portion of this flight being over the waters between the mainland and the island brings that flight within the definition described on page 4 which I have just read, and they rely upon the phrase, I am sure, "any place outside thereof." It is their position, I believe, that the waters between the mainland and Santa Catalina Island are a place outside California.

If that language is interpreted with the strictest literalness, perhaps that result would follow. But it is our position that the language of this statute and other [fol. 253] statutes, particularly, though, we are dealing with the statutes enacted by Congress to implement the commerce laws, that they must be interpreted in the light of the reason for the regulation.

It is our position that this phrase "outside thereof" was intended by Congress to take care of situations along the Canadian and Mexican borders and perhaps elsewhere, where a flight of aircraft would take place commencing at one point in a given state, going outside over Canada or Mexico or perhaps other places, (by other places I mean places that are under the jurisdiction of another state or another jurisdiction), and passing then back into the first state. Under those circumstances it makes sense that in the interest of uniformity of regulation Congress saw fit to give that power to the Civil Aeronautics Board. But the reason for that rule does not obtain here.

Here we have a flight commencing in Los Angeles, in California, over water, which is, I maintain, territorial waters of the United States. It is not another state within the meaning of this definition, another state of the Union, it is not a foreign country, and there is no reason why the rule should attain.

Judge Orr: Is Santa Catalina Island a part of some county in the State?

Mr. Phelps: It is part of the State of California, Your [fol. 254] Honor. Of that I am certain. I believe it is also a part of the County of Los Angeles, but I am not positive of that.

And so, as I say, the reason for uniformity of regulation does not attain here. There is no possible conflict with any other state or any other foreign country, where this flight takes place simply over a reach of water, though, terminating back in California.

And so it is our position, and I think in reading my brief the Court will find the position to be well taken, that the phrase "outside of" interpreted not with absolute literalness but in the light of the meaning, the purpose, the rationale of the regulation, should be read as if it read "outside in another state or outside in a foreign country or territory."

It is a well-known principle, has been frequently announced by the Supreme Court of the United States, that——

Judge Goodman: According to your reasoning then, the plaintiffs would have a right, in an airplane going from San Francisco to Los Angeles but going out, as they sometimes do, over the water, over the Pacific Ocean, for some distance, would be subject to Federal regulation on the theory that that is a place outside the state?

Mr. Phelps: It might follow, Your Honor. That would [fol. 255] certainly be ridiculous, and I think this is equally ridiculous.

Judge Goodman: I asked that because I recall having made one or two flights from San Francisco to Los Angeles, where we went over the ocean for some distance.

Mr. Phelps: I think that they do that frequently, Your Honor.

Judge Orr: I suppose there is a question whether that is the regular route, that is they have regular flights, I wonder if that is the regular route that they have laid out or maybe they go out that way just on an occasion for some particular reason.

Mr. Phelps: That I cannot answer, Your Honor. I don't know whether or not the regular route is over the water or not between Los Angeles and San Francisco. But certainly it might well be feasible and it may often happen, as you suggest, that by virtue of exigencies of weather or otherwise it would be better to divert the flight over the open waters, and it may even be that a regular route has been fixed over the waters. But that is a sheer incident, it has no significance whatever for the purposes of regulating fares here. It is where the flight impinges upon another jurisdiction with the result of the possibility of conflicts in jurisdiction. That is what Congress was seeking to do, seeking to comprehend and to mitigate and prevent in [fol. 256] enacting this legislation.

Judge Orr: You think that in the sense that where the state would have control would differentiate from where the United States would have control—where the United States would have control over these waters, the control of California ceases, doesn't it? And that becomes, whatever jurisdiction be asserted there, is the jurisdiction of the United States.

Mr. Phelps: For certain purposes, Your Honor. It seems to me that in every case you must determine what purposes are being sought to be accomplished. Now I would agree——

Judge Orr: Well, has the State of California any jurisdiction there over those waters? Certainly they would not have, if the flight occurred from one point in California to another point in California, but going through another state—during the time that they were in the other state, California's jurisdiction would cease. Here after they leave the mainland does their jurisdiction cease until they again land in Santa Catalina?

Mr. Phelps: I see no reason why it should, Your Honor, no reason whatever why it should cease.

Judge Orr: Other than in the air over the waters where — is no control by California.

Mr. Phelps: I would not go so far, Your Honor, as to [fol. 257] say no control by California in such sweeping terms as that. I don't think I need to go that far. It may be that for certain local limited purposes California has jurisdiction over those waters. I can imagine, for example, and I think I am correct in saying, that operating out of many ports along the coast of California there are operations by local water taxies which in numerous cases go outside the traditional three-mile limit, and I think I am correct in saying that California has exercised jurisdiction over that kind of operation, and there are cases to the effect that states may exercise jurisdiction over pilot service, at least until the Federal Government has clearly and in unequivocal terms ousted that jurisdiction.

Judge Orr: Would the United States Government have the right to occupy that field, could they constitutionally do so?

Mr. Phelps: I think, Your Honor, they probably could, but my position is that they have not.

Judge Orr: I think that is the situation with which we are confronted. We must decide whether they have or not, is that the idea?

Mr. Phelps: Yes, but this legislation to which I have referred——

Judge Goodman: Do you think there is any other basis in this Section than one of jurisdiction? What other reason [fol. 258] would the United States have for—would Congress have had for stating in the statute that they had jurisdiction over any place outside thereof except on the jurisdictional basis? What other motive would there be for that?

Mr. Phelps: I think they did have, Your Honor, in mind the question of conflicts of jurisdiction, but of the kind that I have referred to a moment ago, conflict with another jurisdiction, like Canada, Mexico, or another State of the Union, and not in a case like this where there is no such conflict.

Judge Goodman: In other words, it is a different situation than if an aircraft went from California, from one

point in California, to another point in California, but went over Nevada?

Mr. Phelps: Quite.

Judge Goodman: There the Federal Government would not have jurisdiction over Nevada because it would still be a state jurisdiction, so it must be something else—there must be something else to the reason for this except the mere fact that it is a place within the jurisdiction of the United States. Do I make myself clear?

Mr. Phelps: I think I understand, Your Honor. There is no doubt—I concede——

Judge Orr: Other than there is no other agency over the waters to exercise jurisdiction other than the United [fol. 259] States. Is that true?

Mr. Phelps: May I answer your question this way, Your Honor.

Judge Orr: Yes.

Mr. Phelps: In the use of this phrase "outside thereof" which is a critical phrase, it is our position that Congress had clearly in mind these situations along the Canadian, Mexican borders, "outside thereof" meaning outside a given particular state, contemplating a flight from a point in one state outside thereof, through Canada or Mexico, back into the same state. Now that, we maintain, was the reason, the rationale, the basis for that language.

Judge Goodman: Would that equally apply, though, if the route went over another state, not necessarily a foreign country but a separate state?

Mr. Phelps: Yes, and there is a separate clause in the Act which expressly covers that very situation. So there is no question about it. We concede freely that if an aircraft commences in California, flies over another state such as Nevada, comes back into California, the Civil Aeronautics Board has jurisdiction. There is no doubt about that. But that is not this case.

Judge Orr: You say the regulation only goes to the question of fare—is that the idea, the fares, the tariffs that can be charged in California?

[fol. 260] Mr. Phelps: For present purposes, it is fares that are involved.

Judge Orr: I am asking that question with this thought in mind, if that were the only thing that California could exercise jurisdiction on—I mean on the question of the fares that might be charged, why would there be any reason for the United States to occupy that field? I can well see on the question of safety regulations or something of that kind, they might be required to step into — regulate or make the flights over water safe. There may be a difference between those situations. But I don't — why would they want to occupy the field to the extent of prescribing the fares. That would be on a ground of having regulated in one respect they should take over in all respects. They couldn't disassociate the two very well.

Mr. Phelps: I don't think Congress had that in mind, Your Honor, because I think it appears from a reading of the Act that they had differentiated sharply between those two separate aspects of the situation, transportation on one hand and safety on the other. The Supreme Court of the United States has frequently stated that where we have a question involved of the possible conflict of jurisdiction between states and the Federal authority that the Federal Legislature upon a given subject matter must be clear and unequivocally wholly free from ambiguity before state [fol. 261] authority will be superseded.

Judge Goodman: May I interrupt you and ask one more question to get this clear in my mind. It is your contention that if in a flight between two points in California where the airplane passes over Nevada that the only basis for jurisdiction of the Federal Government there is with respect to the regulation of the aircraft rather than the regulation of rates?

Mr. Phelps: Both.

Judge Goodman: What?

Mr. Phelps: Both.

Judge Goodman: Would there be any more reason for the Congress wanting to regulate the rates in a case where an airplane went from one point in California to another point part of the way over another state any more so than in the case where it went from San Francisco to Los Angeles and over a part of the water, the Pacific Ocean; what is the difference there?

Mr. Phelps: I think I see your point, that there isn't. I think I may have misled you by focusing and emphasizing unnecessarily the matter of routes and fares. That is what we have involved here, but when I say that—when I referred to transportation a moment ago as one aspect of regulation which the Congress had in mind, I did not mean to confine it to rates. There are other aspects of the [fol. 262] regulation of transportation other than rates which may be involved. For example, the issuance of operating authority. It is not confined merely to rates, and there are, I am sure, other matters than rates which are considered as being involved in the concept of regulation of transportation as distinct from regulation of safety in navigation, and it is in view of the desire of uniformity of regulation of transportation in all of its aspects where it goes over another state or goes over into a foreign country that Congress thought it was desirable to have uniformity. But the important thing, it seems to me, is the flight over a conflicting jurisdiction.

Judge Goodman: Naturally, that is the basis of your argument.

Mr. Phelps: Yes, and I maintain there is no conflict in jurisdiction over which this aircraft travels.

Judge Orr: Is it conflicting jurisdictions as relates to foreign government and other states——

Mr. Phelps: Yes, Your Honor.

Judge Orr: Not between the United States and a state?

Mr. Phelps: No. Now, our position is then that this legislation, considering its purpose, its reason and its objectives, has not clearly, unequivocally divested the state of California of its jurisdiction over this operation. In our brief we have referred to a number of cases of the [fol. 263] United States Supreme Court which I think will support that proposition. I think that is all, Your Honors, I have to say upon this phase of the matter. I will have something more to say if the time should come upon the question of whether or not a temporary injunction should be issued.

Thank you.

ARGUMENT BY MR. PERRY FOR DEFENDANT ATTORNEY GENERAL OF CALIFORNIA

Mr. Perry: May it please the Court, there is in the State of California one law which confers jurisdiction upon the Attorney General of the State of California to appear on behalf of the Public Utilities Commission. The Public Utilities Code of the State of California, Section 2101, reads as follows:

> "The Commission shall see that the provisions of the Constitution and statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, and that the violations thereof are promptly prosecuted and penalties due the State therefor recovered and collected, and to this end it may sue in the name of the People of the State of California. Upon the request of the Commission, the Attorney General or the District Attorney of the proper county or city and county shall aid in any investigation, hearing, or trial had under the pro-
> [fol. 264] visions of this part, and shall institute and prosecute actions or proceedings for the enforcement of the provisions of the Constitution and statutes of this State"—

with an omission, which I need not read, at the end of the Section.

Primarily, if it please the Court, I am appearing solely on the ground of the jurisdiction over the person of the Attorney General. If the Court should hold that our motion is at this time improper I will at that time request leave of Court to file appropriate pleadings in this matter on the merits or answer such questions as the Court may wish to direct without any waiver of the limitations of our attack upon the pleadings at this time.

I allude now, if it please the Court, to the complaint in the within action, page 5 thereof and commencing on line 21, or for purpose of clarity perhaps, if it please the Court, we should begin at line 18:

". . . plaintiffs allege that unless the same are so filed, the said Public Utilities Commission and the members thereof will so direct its legal advisers, namely, the defendants Edmund G. Brown, Attorney General of the State of California . . ."

That, if it please the Court, is the only reference in [fol. 265] that complaint to the Attorney General of the State of California. There is no pleading that the Attorney General has been requested by the Commission to act. There is no allegation and there cannot be any such allegation under the law of the State of California that the Attorney General threatens to act on his own motion, for he has no such power. Public utilities are specifically within the jurisdiction of the Public Utilities Commission unless there is some statute derogating therefrom.

Therefore, as we see it, there is absolutely no pleading of any case, legal or equitable or otherwise or any controversy, legal or equitable, against the Attorney General of the State of California.

There is an attempt to obtain the declaratory relief and injunction in prospective that perhaps some day the Commission may ask the Attorney General to appear as its legal adviser, an injunction perhaps, you might say, to the Attorney General to restrain him from appearing as counsel for the Public Utilities Commission. A novel theory of the law.

Perhaps the Attorney General as a defendant was included only by reason of an excess of caution. But then, if that be the case, if it please the Court, we submit that the District Attorney of each and every county in which the United Air Lines has an office should also have been [fol. 266] included, for it is in the alternative the Commission may request either the Attorney General or any District Attorney.

As a matter of fact, it isn't pleaded that any District Attorney has been requested by the Public Utilities Commission to appear any more than has the Attorney General.

We therefore submit, as to the first ground of the motion to dismiss, that there is not one word in the complaint which states any cause of action whatsoever against the Attorney General of the State of California.

Judge Orr: If the Commission was enjoined from proceeding, that would tie the hands of the Attorney General.

Mr. Perry: That is correct, because, if it please the Court, if the Commission were enjoined, to ask the Attorney General to prosecute an action would be a contempt of court. It would be an action by the Commission, not by the Attorney General.

As to the second point, it follows, we say there is no case or controversy pleaded at all. Therefore, of course, there is no pleading within the jurisdictional amount of this honorable court. There is no pleading that there is any amount in controversy between the plaintiffs and this defendant in excess of $3,000 or any other sum. There is no irreparable damage pleaded, as against the Attorney General, there is no specific—there is no general damage [fol. 267] pleaded as against the Attorney General, for it is not pleaded, as I have heretofore alluded, that he has threatened to do, proposes to do or has done any act inimical to these plaintiffs.

As to the third cause of action, or, I should say, the third ground, if it please the Court, for the motion to dismiss, aver that this Court lacks jurisdiction over the person of the defendant in that it has not been pleaded that we have threatened to do any act against the plaintiffs.

I believe that my previous remarks have clearly illustrated that point to the Court. I will not dwell further upon the third and specific ground for moving to dismiss the within proceeding both as to the complaint for declaratory relief and as to the motion for preliminary injunction. We take it also, if it please the Court, that the injunction pendente lite should be quashed as of the granting of a motion to dismiss this defendant.

If the Court has any inquiry, we shall be most happy to oblige, if we can.

ARGUMENT BY MR. TREADWELL FOR PLAINTIFFS

Mr. Treadwell: If Your Honors please, at this time we ask the Court to permit us to file with the Clerk our brief which we have prepared, which covers the motions to dismiss as well as the application for temporary injunction. We have also prepared the form of the order which we

request, temporary injunction, and we ask leave to deposit [fol. 268] that with the Clerk.

We have also prepared a surety bond in the sum of $2,000. We also ask leave to deposit that with the Clerk.

Judge Orr: The order may be entered.

Mr. Treadwell: If Your Honors please, this is a case of considerable importance. That there should be at this time such a contest would itself indicate to Your Honors the irreparable nature of the injury to the plaintiff. The facts that appear in the complaint, which they are asking to dismiss, are that the State of California boundaries include the mainland of California and the mainland of Catalina Island, and a space of three miles around each of those, and no more.

This route runs from the mainland across that three-mile space and then entirely outside of the State of California runs over a space of 24 miles to Santa Catalina Island. In other words, the distance is thirty miles, but deducting three miles around the Island, three miles along the mainland, we have 24 miles where this route is day and night and at all times entirely outside the State of California.

It is interesting to note that when the original certificate of convenience and necessity was granted to the predecessor of the present plaintiffs, the Board pointed out that in all the litigation California had admitted that was the [fol. 269] situation, and that it had no jurisdiction over this part in regard to fishing and things of that kind.

Judge Orr: We were just discussing—I am not sure about the situation, but how far out from the mainland does the United States have jurisdiction? Is it 12 miles?

Mr. Treadwell: Three miles.

Mr. Ozment: If Your Honors please, if I may interrupt, the United States has asserted claim to ownership to the entire Continental Shelf, whatever that may be. I don't know whether the Continental Shelf runs in this particular area. In the tidelands case, of course, the United States Supreme Court held that the United States owns the three-mile marginal belt along the California coast, but did not make any comment as to the claim to the entire Continental Shelf.

Judge Orr: Over navigational waters what is the jurisdiction of the country, 12 miles from the shore?

Mr. Ozment: I think that is correct, Your Honor.

Mr. Phelps: May I interrupt, Your Honor? We have cited in our briefs a very recent case decided by the International Court of Justice which deals with the question involving the extent of territorial waters, and I think it will appear from that case that the term "territorial waters" is not the inflexible, rigid term that it once may have been considered, as being a band of three miles, but [fol. 270] is a flexible term which depends upon the circumstances in the given case, and in the case to which I refer as cited in our brief there was a band of waters off the coast of Norway up to 30, 40 miles, as I recall, that was considered a part of the territorial waters of Norway for certain purposes.

Mr. Treadwell: I didn't want to get into that, Your Honors, because it has been indicated that some times it may be the line is the distance that you can fire a gun or a cannon, and nowadays you can fire a cannon a good long ways. It might be that that rule applies. No one knows. It is a matter up in the air.

Judge Goodman: Of course the problem we were considering, Mr. Treadwell, is that here you have an island that is 24 miles out—did you say?

Mr. Treadwell: Yes, 30 miles out.

Judge Goodman: Thirty miles out, which is owned by the United States, so that the territorial waters of the United States would extend a certain distance in each direction from that Island as well as from the coastline of California.

Mr. Treadwell: That's right.

Judge Goodman: And the problem is what do you call the thirty-miles that is in between the two?

Judge Orr: Who has jurisdiction over that?

Mr. Treadwell: Over what?

[fol. 271] Judge Orr: That portion of the flight, the waters over which the flight takes place, which is not within the territorial jurisdiction of the United States?

Mr. Treadwell: Well, it is the Government of the International La . It has only decisions under international

laws and principles which govern. It does not have any Congress of anything of that kind, but it belongs to the nations and it is subject to the rules of international law. I think that is about all there is to say about the ocean.

Now, if Your Honors please, when this route was——

Judge Orr: Who fixed the rates on flights from United States to Hawaii?

Mr. Treadwell: I am not informed, Your Honor.

Mr. Ozment: The United States regulates those.

Judge Orr: Yes, sir.

Mr. Ozment: In every phase.

Mr. Treadwell: No doubt they do. But I just—I never had anything to do with it.

Now when this route was established——

Judge Goodman: Is that true as to the flights between California and Nevada?

Mr. Ozment: Yes, Your Honor, as to interstate transportation, yes.

Judge Goodman: The United States regulates that.

Judge Murphy: Who regulates that, the Civil Aeronautics [fol. 272] Board?

Mr. Ozment: Yes.

Judge Orr: Will you pardon these interruptions?

Mr. Treadwell: Surely.

Judge Orr: Who regulates the rates between New York City and England?

Mr. Ozment: There is a gap, Your Honor, in our Act. The Civil Aeronautics Board has jurisdiction to fix rates in interstate transportation. In overseas transportation, it has jurisdiction, but it has no power to fix rates in foreign air transportation. So those rates are unregulated except insofar as they are fixed by agreement between the carriers and approved by the Board.

Judge Orr: Here it is, and it may not be material, but there are about six or seven miles over which these flights take place in which the United States has no jurisdiction.

Mr. Ozment: Well——

Judge Orr: We will wait and get that straightened out later.

Mr. Ozment: Yes.

Mr. Treadwell: So I say the predecessors of the present plaintiffs, when they laid this route out, they went to the Civil Aeronautics Board to get their certificate of convenience and necessity, and they ruled distinctly that the route came within the language of Section 1 of the Act, [fol. 273] which was the one that counsel has read here and which we rely upon. So you had an administrative ruling by the people who were to enforce this law years ago when this application for a certificate of convenience and necessity was granted. Since that time all the rates have been filed with that Board as they are required to be.

Later, 1946, the company that was operating the route entered into an operating contract with United Air Lines. That was submitted to this Board, under this Act, and they approved that, and they provided in the order of proving it that if there was any change in rates they would be filed with the Board.

They were filed with the Board, they were approved, and according to the allegations of the complaint full control of the route has been in the Civil Aeronautics Board and not in the defendants.

Now after all of these years, six years since the granting of the approval of the contract with the United Air Lines and possibly for longer periods before that, nothing has been done of any kind in the control of the route by the California Public Utilities Commission, and even now they have filed,—made no order which could be reviewed or anything of that kind. They are just sending out threats, threatening to not only do that, to insist that the rates be filed with it, but to impose these penalties.

[fol. 274] It is true these penalties might be $500 a day instead of $2,000 a day, but our allegation is that they are going to claim a penalty of $2,000 a day and, as a matter of fact, they filed two suits in regard to another matter in which they claim $2,000 a day.

Mr. Phelps: Just a moment, please. I dislike very much to interrupt, counsel, but counsel is referring to suits brought by the defendant Commission, and I think we are entitled to have the best evidence of those suits, and the entire record of it. If counsel is prepared to offer that here, I would have no objection to it certainly.

Mr. Treadwell: I think you referred to it in your brief.

Judge Orr: What is this now that we are having the dispute about?

Mr. Treadwell: Well, counsel seems to think that it is somewhat important that the penalty might be less than for $2,000 a day.

Judge Orr: That is a matter that is alleged in the complaint and that is what we are considering. We are considering now the allegations of the complaint.

Mr. Treadwell: That's right.

Mr. Perry: May it please the Court, I too dislike interrupting, but counsel is not apparently arguing the motion to dismiss. It is arguing the motion for injunctive [fol. 275] relief. I suggest to the Court that if we are held to answer we would like to have time to file further pleading and be prepared to meet the case on the merits. If we may be permitted to make objections at this time without waiver, we would have no objection to doing so. But we think we should be accorded the opportunity to answer if the motion is to be heard entirely.

Judge Orr: I don't think there is any reason for alarm. The Court here won't consider anything except but what is before it.

Mr. Perry: Very well, Your Honor.

Mr. Phelps: Excuse me, Your Honor, I would just like to continue my interruption. I would like to be heard a little further. My objection was based upon the reference of counsel to the fact that the Commission had already brought suits against this plaintiff, United Air Lines.

Judge Orr: There is no allegation of that in the complaint, is there?

Mr. Phelps: There is not.

Judge Orr: Then we will not consider it.

Mr. Treadwell: The allegations of the complaint are that not only will they demand that these rates be filed with the Public Utilities Commission, but that they will authorize suit to recover penalties at the rate of $2,000 a day. Now, that amounts to $730,000 a year. Even if we can be pro- [fol. 276] tected by the statute of limitations, assuming that, there still would be a penalty of just that in one year of $730,000 of penalties which they claim.

Before this, Your Honors, long before this, the question had come up whether or not a ship line running from San Francisco out into the ocean and down to Los Angeles was an interstate operation. The Supreme Court of the United States in seven cases has held that it was a transaction in foreign commerce.

Judge Orr: That is where a portion of the route went over the waters?

Mr. Treadwell: It went from San Francisco out into the ocean and then down to Los Angeles.

Judge Orr: That is as an established route?

Mr. Treadwell: As a regular route. That was held in many cases, seven cases altogether, by the Supreme Court of the United States. It is true, Your Honors, that a later case in California refused to follow that decision, but, of course, they could not affect the decision of the Supreme Court of the United States, and the Supreme Court of the United States in that case did hold that it amounted to foreign commerce. And the reason for that was that they said that commerce does not mean just carrying goods. It includes intercourse between the states and between foreign countries and anybody that had the ships out on the ocean [fol. 277] there would be subject to the possible difficulties with foreign nations, and that made it foreign commerce, notwithstanding that they were not actually carrying any goods to a foreign country. And while I say there is a case in California that attempts to repudiate the decision of the Supreme Court of the United States, the Supreme Court of the United States has reversed them in every way, shape or manner, and it was in view of that, Your Honors, and they knew that when they passed this Act, and they used the language that they do in the Act in view of that.

I just want to read it to your Honors again, because it is on what we base—it defines interstate and foreign commerce.

Judge Orr: Are you reading from your brief?

Mr. Treadwell: Yes.

Judge Orr: What page?

Mr. Treadwell: Page 13.

It defines interstate or foreign air commerce to include transportation "between points within the same state, ter-

ritory or possession or the District of Columbia, but through the air space over any place outside thereof." Now "over anyplace outside thereof" if they wanted to limit it to some other state, as they could easily have said "some other state," but if they wanted to limit it to any country they [fol. 278] could have said "any country." But when they said "anyplace outside thereof" why, they cover the exact situation that we have here, namely, the part of the ocean that was outside of the state. They said that that was interstate and foreign commerce.

It defines interstate commerce to include "the carriage by aircraft of persons or property for compensation or hire between places in the same state of the United States through the airspace over anyplace outside thereof." Now there again they didn't say any state or any country outside thereof. They said "any place outside thereof," and as I say, the very people that purported to carry out this Act interpreted that as including this airline.

Then interstate air transportation to mean, "the carriage by aircraft of persons or property between places in the same state of the United States through the air space over any place outside thereof."

There they set them off. One of them including a place and the other one referring to this state. It shows you there is no justification for counsel's argument that this word "place" only includes states or countries or something of that kind.

So that makes three cases where Congress has shown an intent to control the air transportation beginning and ending within a single state but flying through the air space [fol. 279] over a place outside thereof.

That is the great question that Your Honors have got to pass upon here. That is the big question. The other questions in the case of procedure and things of that kind, and are very unimportant compared to the importance of knowing what this Act means and who has jurisdiction over this Line.

As I say, it is not only alleged in the complaint that they will impose or take the steps necessary to enforce the collection of these penalties of $2,000 but that they take the position and make the claim that they——

Judge Orr: It is our thought, Mr. Treadwell, that right now your job is to convince us that this is the proper forum to bring this action before.

Mr. Treadwell: Oh, yes, I will be glad to do that.

Judge Orr: We are more concerned about that right now than any other phase of the case.

Mr. Treadwell: Well now, the situation is this, Your Honor, on that: If the Public Utilities Commission had made some order which controls this route, undertook to control the route, there is no doubt that the proper procedure would be a writ of review from that order to the Supreme Court of the United States. That would be what would be the actual way to proceed, the way you could proceed.

But there is nothing of that kind here. There is no [fol. 280] order. We have waited now a minimum of six years, and probably much longer, according to the allegation of the complaint——

Judge Goodman: Suppose, Mr. Treadwell, the Public Utilities Commission, despite what you think it is going to do, never takes any action?

Mr. Treadwell: That's right.

Judge Goodman: Like the dog that barks and doesn't bite. What is the ground for the Federal Court intervening in the matter, unless in the absence of something more than merely some threat that they may want to regulate you, they may want to impose penalties on you, but there is no actual overt act yet.

Mr. Treadwell: Well, of course, we have alleged a threat to do it and that's exactly what was in the Young case, ex parte Young, by the Supreme Court of the United States. They said a threat to impose those penalties of such a nature as that——

Judge Murphy: But how has that been expressed? How has that threat been expressed?

Mr. Treadwell: That is a matter of proof. It has not been—I will say for fairness to the Court that it has not been expressed by an actual order. If it had been expressed by an actual order, why,——

Judge Orr: Isn't your position this, you are kind of [fol. 281] sitting in a kind of uneasy chair?

Mr. Treadwell: Yes.

Judge Orr: That you don't know exactly where you are?

Mr. Treadwell: Yes.

Judge Orr: That you have the Commission one side asserting jurisdiction, and you don't think that they should. However, you are not sure about that and each day that there is no determination, and this could be run for a considerable length of time, and in the meantime if it should be determined that they do have jurisdiction and that you have not complied, why, you would be subject to very heavy penalties?

Mr. Treadwell: That's right.

Judge Orr: You want to avoid that possibility. That is your situation, isn't it?

Mr. Treadwell: Yes, that is the situation.

Judge Goodman: Wouldn't your action be one for declaratory judgment?

Mr. Treadwell: We have asked for—That is what we have asked for.

Judge Goodman: But a three-judge court has no jurisdiction in a declaratory judgment action. It only has jurisdiction if the enforcement of the state statute is sought to be enjoined on the ground that the state statute is unconstitutional. Haven't you an adequate cause of action for a declaratory judgment in the capacity that you [fol. 282] bring suit in the Federal Court and assert the diversity of jurisdiction? You have got that. You have got the dispute against the enforcement of a state statute. Why can't you bring the ordinary action for declaratory judgment? You might even be entitled to relief by way of injunction in the declaratory relief action. But are you properly before a three-judge court?

Mr. Treadwell: Your Honor, we had some discussion about that at the time we filed the complaint and Your Honor thought possibly that jurisdiction of the three-judge court would only go to the question as to the constitutionality of the state statute. It was limited. We have shown in our brief, Your Honor, by numerous cases that when the three-judge court takes the case over, it takes the entire case over, and this is a case for declaratory relief.

Judge Goodman: You have to get into the three-judge court first. There is no doubt about that. That once it assumes jurisdiction——

Mr. Treadwell: A three-judge court is not difficult, Your Honor, because we allege the unconstitutionality of these penalties, and that really means something, Your Honors.

Judge Orr: Is it the unconstitutionality of the state statute or the misuse of the power vested in this Commission that you are alleging? You are saying that they are working under a state statute but they are assuming to mis- [fol. 283] use their power, assuming a jurisdiction which the state statute does not confer?

Mr. Treadwell: I don't think that is exactly what our allegations are.

Judge Orr: According to your theory they are threatening to interfere in a Federal field, in a field which has been taken over by the Federal authorities?

Mr. Treadwell: Well, if Your Honor please——

Judge Orr: It is the act of the individual, isn't it, rather than the unconstitutionality of the statute?

Mr. Treadwell: We make two points. In the first place we claim that they have no right to interfere with the route at all. They have no jurisdiction.

Judge Orr: Well, that is the act of the individual; I mean, the act of the Commission.

Mr. Treadwell: That's right.

Judge Orr: You are claiming that they are exercising authority or attempting to exercise authority which no where exists.

Mr. Treadwell: That's right. But we claim that the Act is itself unconstitutional, and we have strong——

Judge Orr: What do you mean, the California Act?

Mr. Treadwell: The California Act imposing these penalties.

Judge Goodman: Well, it is not so much, Mr. Treadwell, [fol. 284] that you are objecting to the penalty, as that you just say they haven't got any right to impose it at all.

Mr. Treadwell: That's right.

Judge Goodman: Well, that goes to the jurisdiction. Once you talk about just the right to impose the penalty, then you have to assume that they have jurisdiction. But

the particular act of imposing the penalty is unconstitutional.

Mr. Treadwell: No, Your Honor. Whether they have the jurisdiction or not, the penalties could be void. That is our contention, that even if the Court should hold that they have jurisdiction, then the validity of the penalties would come up, and in the second place we allege that this air line is not within the provisions of the California Act in imposing those penalties. The argument on that, Your Honors, is this, that the Act imposes penalties on certain public utilities and on common carriers but——

Judge Orr: Within the State?

Mr. Treadwell: Yes.

Judge Orr: Did it attempt to impose anything outside the State?

Mr. Treadwell: Well, I wouldn't think so

Judge Orr: Well then, I have this thought in mind then, the Act itself, if it does not go that far, just reading it, it is not unconstitutional, is it? It is not the Act itself, but it is the unlawful, you allege, the unlawful enforcement?

[fol. 285] Mr. Treadwell: Well, no, Your Honor. We say that——

Judge Orr: Or attempted enforcement.

Mr. Treadwell: We say that in imposing these penalties, it comes directly within the ex parte Young case and other cases that we have cited, and it is held, Your Honor, in the cases which we have cited in our brief, that where you impose a penalty and the party who is to enforce it, can simply sit down and wait, neither bring any action for years, that that makes it an illegal penalty because it takes away your property without any reference to formally informing you of your offense and what your offense is but by simply accumulating it over a period of years you make it absolutely prohibitory for anybody to do business.

Judge Orr: You may have a cause of action there, Mr. Treadwell. Where should that be tried? Should three judges—does a three-judge court have jurisdiction there where it may be that the provisions of the state statute itself is perfectly constitutional, that it doesn't attempt to regulate in the fields which have been taken over by the Federal

Government? But then, we will say, that being the case, that the Commission charged with the enforcement of those provisions, misread it and attempts to give it a larger application than it really has and applies it. Then what is your remedy then? Isn't it the proposition that—can't you get a declaratory judgment or restraint against those [fol. 286] individuals because of their attempting to enter this field which the statute itself does not authorize them to enter?

Mr. Treadwell: Well now, if Your Honor please, that is not the situation as we view it. The cases that we rely upon are that the statute itself, when it is of that nature, that it permits the accumulation of the penalties in that way, making them prohibitory and prohibitive, that the statute itself is unconstitutional, and that is what we allege.

Judge Goodman: But, Mr. Treadwell, don't you think then in equity the court can look right through that and see that your real ground is that the state has no right to enter this field? You are not complaining, as would a citizen of California who was subject to the regulation of this statute, that the statute is unconstitutional with respect to the manner in which these penalties are provided for in the statute. What you are complaining about here in equity is not that you don't like the way the penalties are being assessed but that the State hasn't got any right at all to enter this field, that you are solely subject to Federal regulation.

Now, that is your real question. So in attempting to get that before a three-judge court, you put the allegation in your complaint that the state statute is unconstitutional because of the fact that the penalties that are sought to be [fol. 287] imposed have been declared in certain cases to be of a nature to have the infirmity that results in invalidity in the statute itself. But that is not the way you are really—that is not your complaint. Your complaint is that the state hasn't got any right to come in here at all.

Mr. Treadwell: Well, I don't think——

Judge Goodman: So you are asking us to decide an academic question, to decide an academic question that does not specifically arise under the three-judge statute at all. You should come in, in the regular way, in the court and

make your application and state your cause of action, that this is a federal field and that the state has got no right to enter into it, set up your cause of action and ask for your relief, equitable or otherwise.

Mr. Treadwell: Well, if Your Honor please, a person cannot very well come into court and divide up his cause of action and put it up in several pieces and expect to leave any of it out. We have all of these wrongs. We have the wrong of the Commission interfering at all. That is one wrong.

In the second crime, even if they have a right to control in certain ways, still they would have no right to these penalties. Now why should Your Honors say that to one of them—of course, one of them is bigger because it includes the whole, but sometimes you lose the whole, your [fol. 288] extreme position, and still the question as to validity of these questions of penalties is here and it is included here. I did not select the three-judge court or have anything to do with it. The question of whether it is a three-judge court case or one for the court to decide, the court is to determine under the statute.

Judge Orr: That is what we want to do right now.

Mr. Treadwell: The Court has done that.

Judge Orr: We had to convene for that purpose, I think. We want to find out whether we do or not.

Mr. Treadwell: Your Honors will note these cases on page 7 of our brief. These rules are just as applicable to a three-judge court as a one-judge court.

Judge Goodman: Is there any question at all in your mind as to the jurisdiction of this court to hear your case?

Mr. Treadwell: None at all.

Judge Goodman: Without the imposition of the three-judge court?

Mr. Treadwell: I don't think so. I think it is a case which requires a three-judge court because we raise the constitutionality of the state statute.

Judge Goodman: Of course you can raise the constitutionality of the state statute in a case other than a three-judge court. But what I am trying to find out, are you satisfied in your own mind that this court has jurisdiction of your cause of action as a United States District Court?

[fol. 289] Mr. Treadwell: Well, I was just coming to that. That is to answer what they say about this Alabama case. This Alabama case——

Judge Goodman: I only ask that, Mr. Treadwell, because if that is so, why, we could just go ahead and hear this case, and I will extend the invitation to Judges Orr and Murphy to sit with me as a District Court, and if we came to a unanimous decision it would still be a district court and not a statutory three-judge court.

Mr. Treadwell: They say you can't do that.

Judge Goodman: I beg your pardon?

Mr. Treadwell: There are decisions that say that the court cannot call in two judges to assist him.

Judge Orr: Then they can be spectators.

Mr. Treadwell: They can be spectators. That is all they would be.

Now, Your Honor, this Alabama case is a serious proposition. In that case——

Judge Orr. Well, if you will pardon just another interruption here. If your theory is a theory that the United States of America has preempted this field, if your theory is correct, then there is no reason for a determination of whether the penalties are excessive or not. Wouldn't that be the case?

Mr. Treadwell: That is right. I have suggested that [fol. 290] in my brief, Your Honor, that there is not need to decide that question if you decide with us that they have no jurisdiction over the route. That's all there is to it. Of course, penalties would have no effect against us if they have no jurisdiction.

Judge Goodman: Well, then, if that were the case, Mr. Treadwell, the three-judge court could dissolve and the United States District Court in the regular way proceed to determine a question, primary question, as to whether or not, irrespective of constitutionality of the statute, as to whether or not the state would come into this field at all or whether a declaratory judgment should not issue.

Mr. Treadwell: Of course, Your Honor, we are not withdrawing any part of our case. But there is the power of the Court, with the case here before it, to determine what issues could be decided that would give us all the relief that we

ask for and still avoid the passing on any constitutional question. That is a power that the courts exercise.

Judge Orr: I suppose one judge could proceed to the point where it would determine that the constitutional question was present, and then convene as such and determine as becomes necessary. But all of the other propositions could be determined by one judge. I suppose you admit that, don't you, that one judge could, the regular district [fol. 291] court, could make a determination of whether the United States has preempted this field?

Mr. Treadwell: I think it could if it was presented separately. But it isn't presented separately. It has been presented in this complaint and the court has got to look at the complaint and determine whether the three-judge court is proper in the case and then the decisions are that that court has power to pass upon all issues, whether they affect constitutionality or not, that any issue in the case they can pass upon, and that seems reasonable because you just can't fix up a case and have it today in one court and tomorrow in another court.

Judge Goodman: You would feel satisfied that if this three-judge court decided—did not decide the constitutional question but decided the primary question that the state had no right to be engaged in this regulation, that that decision would be sustainable and within the jurisdiction of the three-judge court?

Mr. Treadwell: I don't put it that way, your Honor. I put it this way, that if this court or any court that has jurisdiction in this case gives us all the relief that we are asking for by enjoining them from interfering with this route at all, why then I concede there would be no necessity of also passing on the question of the validity of the penalties. But I don't withdraw them or anything of that [fol. 292] kind. But I just say if the court should do that, we rely on them and we rely on them and ask for a decision

I can make that clear, Your Honor, in this way. We complain that the statute does not apply to us that imposes these penalties. We have had three cases with the Public Utilities Commission over penalties under that same Section and the court has held, the Superior Court of San Mateo County, and the Superior Court of Los Angeles County,

have both held that the penalties do not apply at all to air carriers. So we are not waiving a decision on that. We are just saying that if in some way or other the court could give us all the relief that we are entitled to without passing on that question, it would be all right with us.

Judge Orr: Your position is this, as I understand it, that you have several grounds for relief, and you allege several grounds for relief, among those grounds being that a certain statute is unconstitutional. That that bringing in of the fact of the unconstitutionality of the one statute brings into play the jurisdiction of the three-judge court and that they then can determine any of the grounds for relief that you allege?

Mr. Treadwell: That is exactly our position, Your Honor. We have cited cases that uphold that.

Now if Your Honors please, I would like to say a word about this Alabama case. That case was rather a revolu-[fol. 293] tionary case and I have the authority of the chief attorney for the Public Utilities Commission that it is a revolutionary case. But at any rate, it decided that when the Commission had refused the proper relief that the complaining party thought he had, that he could not then file a suit in the federal courts but that he would have to go into the state court and file any suit that he had, and they pointed out, as counsel here in his argument attempted to point out, that the state courts have jurisdiction.

Well, the trouble with that is that these statutes that constitute the Public Utilities Law of California are entirely different from what they were in Alabama, where such a suit could be maintained, and they provide that no court of the state may in any way adversely affect any order of the Commission. So it is absolutely impossible to go into the state court. There is no state court that could give you any relief. They couldn't enjoin them, couldn't reverse, couldn't remand, or do anything with it, and that statute has been held constitutional by the California courts on the grounds, that I don't need to talk about here. So the Alabama case does not apply to the California situation at all. They held that where you had adequate remedy by a suit in the state court, why, that you could not bring it into the federal court. But since we had no remedy in the state

court, we couldn't possibly—if the Commission only [fol. 294] threatened something or if they actually had done something, if they actually had done something, our remedy of course would be to go to the Supreme Court on a writ of review.

Where they haven't done anything it is——

Judge Orr: Pardon me. How much longer do you expect to be?

Mr. Treadwell: I don't think I will be very much longer. I don't expect to be very much longer.

Judge Orr: Do you expect to take very much time?

Mr. Ozment: Only 10 minutes, unless I may be permitted to talk about the status of the water between the mainland and California.

Mr. Treadwell: Now, something was said in connection with the argument that has already been made by the defendants about the penalties and their accumulation and their large amount and long periods that have already expired in being a ground of irreparable injury. That was all discussed in the Young case by the Supreme Court of the United States and they know that the claim of penalties over the long period that were allowed to accumulate was an irreparable injury.

Judge Orr: What case was that?

Mr. Treadwell: Ex parte Young, Supreme Court of the United States. Young was the Attorney General of Minnesota, I think.

Judge Orr: Cited in your brief, I imagine.

[fol. 295] Mr. Treadwell: Yes, it is all covered.

So we think there is no basis at all for argument there is no irreparable injury shown. Have a thing like that under you all the time, $730,000 a year would break any company and certainly be irreparable, and it has been held to stop a multiplicity of suits was a definite ground of equitable relief, and if there were large and repeated accumulations that they were irreparable.

I think that is the only thing I wish to talk about on that subject. I would rather hear the argument. It is understood, as I understand it, Your Honor, that if we wish to

file further briefs covering any of the matters here we could do so.

Judge Orr: Hasn't been so understood yet. I did not know any request of that kind had been made.

Mr. Treadwell: We are satisfied with our brief as it is, Your Honor. We anticipated all these questions and I think we have answered them.

Judge Orr: The way we understand the matter now, Mr. Treadwell, on the matters now presented before us, we will pass on the motion to dismiss. If we should determine that the motion to dismiss should be denied, then of course we would have to afford counsel for the Commission and for the Attorney General to furnish further—maybe you would want to plead then, wouldn't you?

[fol. 296] Mr. Phelps: Yes, Your Honor.

Judge Orr: Give some time to plead; if the issue is joined, then have to take evidence on it, I suppose.

Mr. Treadwell: Yes, I think that is the way the thing lines up.

Judge Orr: Yes.

ARGUMENT BY MR. OZMENT FOR INTERVENORS

Mr. Ozment: May it please the Court, we too have prepared a memorandum which purports to cover most of the issues in the case, both as to the merits and the matters there placed in the motion to dismiss. We have prepared this on the assumption at this juncture we would have been permitted to intervene. I ask leave and submit at this time and ask the Court to ignore the captions to the effect that we are an intervenor.

Insofar as the question of jurisdiction is concerned, we have covered that in our memorandum. Not, however, the question of the three-judge court.

I would like to speak very briefly on the subject of the Alabama Public Service Commission case. In that case the matter involved was purely intra-state transportation, no question in anybody's mind about that. The court said it was intra-state, it was a matter purely for local concern. This isn't the case at all. Here the question is whether

these operations are interstate or whether they are intrastate, which is quite a different situation in the normal [fol. 297] intra-state field.

This is the precise type of case which the federal courts habitually decide. There is a claim here that there is a conflict between state and federal regulations. In most cases those are decided in the first instance by the federal court rather than remanding the matter to go through the state courts. That assumes, of course, that the state remedies are adequate on which we, of course, take no position.

The Board's interest in this matter is, of course, as to who has regulatory jurisdiction over this operation. These very waters have been the subject of prior judicial decisions in the Wilmington case, cited in our papers. The Supreme Court of the United States held that transportation between Avalon and San Pedro, which is precisely the same transportation that is here involved, was subject to rate regulation by the State of California until such time as the Federal Government should have acted.

Now, the Federal Government has acted in this matter, and our position, of course, is that we seek merely a declaration to that effect.

Now, as to the three-judge court, I would not add anything to what Mr. Treadwell has said. In our judgment the case can properly be disposed of by the three-judge court sitting as a statutory three-judge court upon the [fol. 298] finding that there is a substantial constitutional issue presented, even though the court never reaches that substantial constitutional issue, as a basis for its decision.

By the same token, our position is that if the court should see fit to base its decision on the question of preemption of the field of regulation that that is a matter which properly could be decided by a one-judge court so the Civil Aeronautics Board's concern, whether or not it is a three-judge court or a one-judge court, we think the court can properly decide the case, it being of significance primarily as to whether it goes to the Supreme Court first or whether it has to go through the Circuit Court in the further stages of the case.

Judge Orr: I assume, as far as you are concerned, the constitutional question doesn't concern you so much.

Mr. Ozment: No, indeed.

Judge Orr: That question invoking the jurisdiction of the three-judge court doesn't concern the government.

Mr. Ozment: No, sir, we have no legal concern in that matter at all.

Judge Goodman: Apparently, in my study of the three-judge statutes, the main reason Congress imposed them respecting the question of enjoining the operation of a statute on the ground of constitutional infirmity was so important they thought it wise to call three judges in to [fol. 299] hear it and with the direct appeal to the Supreme Court. If that question is not really involved, then the two extra judges shouldn't be taken from their other work and brought in here if the question itself can be decided primarily upon the principal ground that it doesn't involve the validity of the Federal statute.

Mr. Ozment: That is correct; but in this case the three judges are here. In other words, they have been convened. My point was merely the practical one that we think that the court can go ahead and decide the case, the three-judge court, or two just can disassociate themselves and one judge go ahead and decide. We are proceeding on the assumption this is the Board's area of regulation rather than the state of California.

One further word about the allegation to the complaint. As I read the cases, those are the standard allegations in this type of case. In other words, the plaintiffs in this case have alleged just precisely what plaintiffs always allege in such cases, ex-parte Young, that whole line of cases involving claims of conflicting federal and state regulation. The carrier doesn't know what position he is in. He can't accept two masters, he has to decide to which he is answerable, and we think that that does make, I think, a clear case for the jurisdiction of the Court, and we ask the Court to retain the case and to decide it and unless the Court de- [fol. 300] sires to hear something concerning the status of those waters between the mainland and Santa Catalina, I have nothing further.

Judge Goodman: If the court should deny this motion to dismiss, would counsel on all sides be agreeable to hearing the matter on the merits for final injunction instead of having just a hearing on the preliminary injunction? We do that sometimes in these three-judge cases.

In other words, if we take under advisement the matter of the motion to dismiss and then it should be denied, we could then set the matter down for hearing, because there is a temporary restraining order that is in effect until such time as we make a decision, have the pleadings filed and determine the matter on the merits rather than on just an application for preliminary injunction.

I don't know what the desires of counsel are in that regard, but that is a speedy way of determining litigation in these three-judge cases.

Mr. Ozment: We are willing to submit the case for final decision at this time. We don't think there are any real facts in dispute.

I would like to hand up some Coast and Geodetic Survey maps just so the Court can locate the Island, and in the decisions we have cited we talk about this bay and talk about that bay.

[fol. 301] COLLOQUY

Judge Orr: You are talking about something a little different. Maybe all parties might be able to submit the case on the whole question that has now been offered. I don't know if that is the case. It wouldn't be necessary for any further hearing to be had, but you could file further briefs if you want to answer.

Mr. Phelps: Yes, Your Honor, in the event the motion is denied I should like the opportunity to file an answer. I had hoped also to have the opportunity to be heard upon the question of injunctive relief; time will not permit that.

Judge Orr: What do you think of the suggestion of Judge Goodman's that if we deny the motion to dismiss, that after the pleadings have been filed we hear the matter on the merits and the question whether permanent injunction should be issued?

Mr. Phelps: I am a little reluctant, Your Honor, to acquiesce in that for this reason: To the extent that the plaintiff's complaint and case rests upon the need for equitable relief in the form of an injunction against any action taken by the Commission, I should like to be heard upon that question.

Judge Goodman: That would apply whether it is a preliminary injunction or a final injunction, wouldn't it? Wouldn't make any difference, involves the fundamental question whether equitable relief in the form of an injunc-
[fol. 302] tion should issue, that is all.

Mr. Phelps: Yes.

Judge Goodman: I merely threw that out as a suggestion, makes it a little less work for the lawyers involved in the case, too, don't have to have both a hearing on a preliminary injunction and a hearing on a permanent injunction. That is disposed of in the same way, but it has a finality to it that allows either party to forthwith take an appeal.

However, I wouldn't suggest that the court make any order, I am merely suggesting.

Judge Orr: It is a practical situation, just a practical situation. Whatever is done, your situation is subject to this injunction which is now in force and effect. Whether it should be listed right away or whether it will wait until we can determine the whole matter, your rights will be the same in the long run, get the same adjudication.

Mr. Phelps: See if I understand your Honor. The suggestion of Judge Goodman is the Court will rule upon the motion to dismiss first and in the event that it is denied that then there should be a further hearing which will include a hearing, an argument, I presume, on the question whether or not injunctive relief should be granted?

Judge Goodman: With time allowed to file responsive pleadings.

[fol. 303] Mr. Phelps: I think that will be satisfactory.

Judge Orr: That be agreeable to you, Mr. Treadwell?

Mr. Treadwell: Seems to me, Your Honor, it would be all right.

Judge Orr: How about counsel——

Mr. Perry: I think the Attorney General would have no objection. I would like one point of clarification, Your

Honor. That is, as I understand this proceeding, the plaintiffs have requested an interlocutory injunction pending trial of the action for declaratory relief. Now, if we proceed, if it results in a permanent injunction, does not then the action for declaratory relief from the plaintiffs point of view become moot to the prejudice of the defendants? I understood, in other words, that their motion for injunctive relief at this time was just until they got into court on their action for declaratory relief, but that they weren't relying solely on an action for injunctive relief to determine the merits of the case.

Judge Orr: Those things would come down simultaneously, wouldn't they?

Judge Goodman: That's right, Judge. All I am suggesting is that instead of having a hearing on the preliminary injunction, just have a trial in the case.

Mr. Perry: I think that would be satisfactory with the Attorney General.

[fol. 304] Judge Goodman: Each side present any matter they wish.

Judge Orr: The motion to dismiss will stand submitted. The question of the motion to intervene will also be submitted and we will rule upon that at the time we rule on the motion to dismiss.

Mr. Ozment: Thank you, Your Honors, and may I at this time lodge with the Clerk maps of the coastal area here just in the event the Court should find it necessary to use them. They are non-controversial, Coast and Geodetic Survey maps.

Judge Orr: Taken unofficially?

Judge Goodman: Any objection to their being marked?

Mr. Phelps: I am sure I will have none.

Judge Goodman: They can be marked.

Mr. Phelps: I have no objection.

Judge Orr: Might have them marked as a proposed exhibit.

Mr. Ozment: All right.

Judge Orr: Got a rather incongruous situation of a party that has not been admitted to intervene——

Mr. Ozment: I will withdraw them, Your Honor, if you think it best.

Judge Orr: Let the Clerk have custody of them and we can determine that later. We will be at recess.

Mr. Treadwell: Wondering, Your Honor, shouldn't the motion for temporary injunction be submitted or something [fol. 305] so that Your Honors can make any order?

Judge Orr: The understanding is that the restraining order which has already been issued remain in force and effect until determined otherwise.

Be at recess.

Filed Sep. 17, 1952. C. W. Calbreath, Clerk.

[fols. 306-307] In United States District Court
[Title omitted]

Transcript of Proceedings on Motion for Preliminary Injunction—Friday, November 21st, 1952.

Appearances:

For the Plaintiffs: Messrs. Treadwell & Laughlin, by Edward F. Treadwell, Esq., Reginald S. Laughlin, Esq., and Colin C. Kelley, Esq.

For the Defendants: J. T. Phelps, Esq., and Everett C. McKeage, Esq.

For the Intervenors: O. D. Ozment, Esq., Attorney Civil Aeronautics Board, Elmer Collett, Esq., Assistant United States Attorney.

[fol. 308] Colloquy Between Court and Counsel

The Clerk: United Air Lines, Incorporated, et al., vs. the California Public Utilities Commission. Court trial. Motion for leave to file answer to Intervenor's complaint, before Honorable Judges William E. Orr, Edward P. Murphy and Louis E. Goodman.

Judge Orr: Are you ready, gentlemen?

Mr. Phelps: If Your Honors please, Mr. Treadwell and Mr. Ozment, counsel for the plaintiffs and for the Civil Aeronautics Board, have kindly consented to allow me to go forward briefly with the motion which I have filed, leave

to file an answer to the Intervenor's complaint. I promise to be brief, but in a few words I should like to give the reasons why I filed this motion.

When this Court overruled the defendant's motion to dismiss, which was heretofore filed, and ordered the defendants to answer, it was my opinion, after reading the Rules of Civil Procedure, Federal Rules, specifically Rule 7(a), that the Rules did not contemplate or even permit the filing of a separate answer to an Intervenor's complaint. So at the time we filed our answer to the plaintiffs' complaint we did not file a separate answer to the Intervenor's complaint. Subsequently Mr. Ozment suggested the desirability of our filing a separate answer to their complaint and indicated that they were anxious to have an expres-[fol. 309] sion of our position on certain allegations in their complaint which they felt were not exactly parallel to those set out in the plaintiffs' complaint. I indicated I have no objection to that, and I have drafted such an answer and have attached it to my motion for leave to file an answer, and I am quite willing to leave it entirely up to the Court. If the Court feels that such an answer should be filed or is permitted to be filed, I am quite willing that it should be. If the Court feels that it is not permitted, I am willing that our answer should be rejected.

Judge Orr: Is there objection?

Mr. Ozment: No, Your Honor.

The Court: The order may be entered permitting you to file it.

Mr. Phelps: Thank you.

The Clerk: Will respective counsel please state their appearances?

Mr. Treadwell: For the plaintiffs, Your Honor, Edward F. Treadwell, Reginald S. Laughlin, of the firm of Treadwell and Laughlin. We also have associated with us Mr. Colin C. Kelley. I think he possibly at the former hearing was associated.

Mr. Ozment: O. D. Ozment, Attorney Civil Aeronautics Board, and Mr. Elmer C. Collett, U. S. Attorney's office, for the Civil Aeronautics Board.

[fol. 310] Mr. Phelps: J. T. Phelps and Everett C. McKeage, on behalf of the defendants.

OPENING STATEMENT BY PLAINTIFF

Mr. Treadwell: Your Honors please, in view of the fact that we argued considerably orally and also by briefs on the motion to dismiss, we do not think it is necessary to make what might be deemed ordinarily an opening statement before we proceed with the trial. I think Your Honors are pretty well advised as to what the issues were at the time of the argument on the motion to dismiss. However, there are a few matters that have occurred since that time and we think we should lay those before the Court at this time.

We have prepared and filed a very elaborate brief on the motion to dismiss and we want that brief to stand, but we are going to file a supplement to it, which we will have ready to file today.

Now, first as to the plaintiff's route. The defendant has filed an answer to the complaint and they deny that the route continues over the high seas and outside the boundaries of the territorial jurisdiction of the State for a distance of about twenty-four miles. But they admit that the route begins in Los Angeles County and terminates at Avalon.

It is hard, Your Honors, to understand the reason for that denial. It is alleged in the complaint that the route proceeds for a distance of twenty-four miles from the sea coast to Avalon, and if you deduct from the thirty miles dis- [fol. 311] tance, which it is from the coast to Avalon, the three mile range along the coast and the three mile range along the island, which is six miles, that would leave you twenty-four miles which is alleged is outside the territorial jurisdiction of the State of California.

The only explanation of it, that I know, is what I have seen in the press in the last week, that is, in the case of United States against the State of California which was originally reported in 332 U. S. 19, wherein the State is claiming that the boundary of California should be determined by taking the capes along the coast and drawing straight lines from one cape to the other and including all the land that falls within that straight line as being part of the State of California, and all I can say on that, Your

Honors, is that according to the press in the last few days the Special Master appointed by the Court has held that that is an unsound view and we haven't yet had access to that report but I have no doubt of the correctness of the press dispatches and we won't say nothing more about it.

Judge Goodman: Do the defendants deny the distance of the route?

Mr. Treadwell: No. I am just coming to that, Your Honor.

Judge Orr: That is the Tidelands Case you are speaking about?

[fol. 312] Mr. Treadwell: Yes, the so-called Tidelands Case.

The defendants further admit in their answer that the distance from the Mainland to Catalina Island is approximately thirty miles. They also admit that no rates, fares or charges pertaining to said route have been filed with the defendant Public Utilities Commission of the State of California, and admit that the Public Utilities Commission now claims and asserts that all the rates, fares and charges of said route must be filed with the Public Utilities Commission.

Now in the defendants' answer, which they have just filed now, to the complaint and intervention, they admit that flights to Santa Catalina Island require flights of aircraft over waters, but they deny that such waters are outside the boundaries and territorial jurisdiction of the State of California.

In the same answer, paragraph 6, they deny that they have informed the plaintiffs that said route and operations between Santa Catalina Island and the Mainland of California are entirely within the regulatory province and jurisdiction of the Commission, but admit that said Commission has informed the plaintiffs that all rates, fares and charges for such transportation between Santa Catalina Island and the Mainland of California must be filed with said Commission.

The same paragraph of the answer of the defendants deny that they have threatened to institute proceedings to [fol. 313] recover penalties, and deny that the defendants, or any of them, intended by the institution of proceedings

before the Commission and the Courts to undertake to exercise regulatory control over the said route and operations except such control over the rates and charges pertaining to said route and operation as may be finally determined and justified after formal proceedings commenced by an order of the Commission instituting investigation into said route and operations.

In the complaint, Your Honors, we set forth many grounds of jurisdiction of the Court, among others the Section 1337 of the Code which gives jurisdiction of all cases, irrespective of citizenship or amount involved, that involve an Act of Congress for the regulation of commerce, but we did allege it exceeded the jurisdictional amount, and they put that in issue, whether the jurisdictional amount is exceeded.

We think that the matter is entirely immaterial because jurisdiction has been held, in the case of Mulford against Smith, 307 U. S. 38, 46, where they directly held the Court had jurisdiction irrespective of diversity of citizenship or amount of controversy.

Your Honors will remember that one of the questions raised on motion to dismiss was the contention that the matters would have to first be decided by the State Courts. Since that time Your Honors—that was fully argued in our brief—but since that time the decision by the District [fol. 314] Court of New Jersey has been rendered in the case of Pennsylvania Greyhound Lines, Incorporated, vs. the Board of Public Utilities Commission, Department of Public Utilities, State of New Jersey, Civil Number 65051. In that case the opinion was written by Judge Foreman, and he referred to this Rule as to waiting for decision by the State Court. He said that that was a proper Rule where the whole question involved the construction of State Statutes, but where the main question was Federal Statutes, as it is here, the Civil Aeronautics Act, which claims jurisdiction, as we claim, over this route——

Judge Goodman: Mr. Treadwell, it is difficult for the members of the Court to follow this presentation. This is the trial of this case, and I think the first thing that should be done is to make the record on which the cause can be sustained, and then make any legal answer you wish. We don't know if there is any factual controversy here. That

should be gotten out of the way first, and if you have any difficulty about that, I suggest that my colleagues, since we are governed by the Federal Rules of Civil Procedure, we can have a pre-trial conference right now and find out what really is in controversy, if there is anything in controversy of a factual nature.

Mr. Treadwell: We are not going any further, Your Honor. We had just concluded what we thought was wise to call to the Court's attention, but we are ready to put [fol. 315] in our evidence and it will be very brief.

We will call Mr. Dillworth.

W. D. DILLWORTH, called on behalf of the plaintiffs, sworn.

The Clerk:

Q. Please state your full name to the Court, sir?
A. W. D. Dillworth.

Direct examination.

Mr. Treadwell:

Q. Mr. Dillworth, what is your occupation or profession?
A. I am traffic manager for United Air Lines.
Q. And as such have you become acquainted with the portion of the United Air Lines layout generally referred to as the Catalina Route?
A. Yes, I have, sir.
Q. How long have you worked for the United Air Lines?
A. Slightly over nine years.
Q. And have you also become familiar in that connection with the company known as the Catalina Air Transport?
A. Yes, I have.
Q. Did you know the route when they operated it directly themselves?
A. I wasn't too familiar with it at that time, but at the [fol. 316] time United became interested in taking over that operation it was generally my first real familiarity with the route.

Q. About when was that?

A. That was in June of 1946.

Q. So since that time you have been quite familiar with the route?

A. Yes, I have, sir.

Q. And will you describe where the route initiates, starts, and where it terminates?

A. The Catalina Route, as we operate our flights, originates in Los Angeles.

Q. At what point in Los Angeles?

A. In Los Angeles at the International Airport. And proceeds to Long Beach, which is the Long Beach Municipal Airport, which is approximately 15 miles away from that point, and it proceeds over the ocean to the Catalina Airport at Catalina, which is a distance of approximately 32 miles.

Q. That is the distance from the shore of the Pacific Ocean in Los Angeles County out to Avalon, that is substantially 32 miles, is that right?

A. From the Long Beach——

Q. From Long Beach. Long Beach is right on the shore, is it not?

A. Yes.

Q. And is there an airport there?

[fol. 317] A. Yes.

Q. How close to the shore is the airport?

A. Well, the airport, as I recall, is very close to the shore itself.

Q. So from the shore to Avalon is substantially 32 miles?

A. Yes, sir.

Q. Now, during the time that you have been familiar with this line, have the rates, tariffs of the companies operating it been filed with the Civil Aeronautics Board?

A. Yes, insofar as, particularly, United Air Lines is concerned, we took over the tariffs that Catalina had effective as of June 20, 1946. Those were filed with the Board on behalf of the United Air Lines at the time and have continued to be filed with the Civil Aeronautics Board.

Q. And were those the tariffs that were filed with the Public Utilities Commission of California?

A. No, sir, they have not been.

Q. During the time that you have been familiar with the route, have the United Air Lines and Catalina Air Transport regularly filed the reports required to be filed by the Civil Aeronautics Act?

A. Yes, sir. United files the same reports for that operation as it does for its other operations throughout the United States.

Q. Those are filed with the Civil Aeronautics Board?

[fol. 318] A. With the C. A. B., yes, sir.

Q. And not with the California Public Utilities Commission?

A. No, sir, we have never filed them with it.

Mr. Treadwell: While this witness is on the stand, I would like to introduce some exhibits which possibly counsel would like to ask him about.

We have certified copies, Your Honors, of all the principal documents between the plaintiffs here and the Civil Aeronautics Board duly certified by the officials of that body. The first one is the operating agreement between United Air Lines, Inc., and the Catalina Air Transport, and opinion and order of June 3, 1946, by the Civil Aeronautics Board approving said agreement, and the operation by the United Air Lines over the route of Catalina Air Transport, and all supplemental agreements filed with the Board between United Air Lines, Inc., and Catalina Air Transport relating to the operation by United over the route of Catalina Air Transport, and orders by the Civil Aeronautics Board approving all of such supplemental agreements.

These are all fastened together, Your Honors, and there is attached to them a certificate, and we ask that that be marked as one exhibit, Plaintiffs' exhibit.

OFFERS IN EVIDENCE

The Clerk: Plaintiffs' Exhibit 1 introduced and filed into evidence.

[fol. 319] (Thereupon documents referred to were received in evidence and marked Plaintiffs' Exhibit No. 1.)

Mr. Treadwell: These are deemed read, Your Honors? They may have been deemed read?

Judge Orr: Pardon me, but I didn't hear you.

Mr. Treadwell: I say they may have been deemed read, this last exhibit?

Judge Orr: Yes.

Mr. Treadwell: The second one is true copies of the tariffs of United Air Lines, Incorporated, currently on file with the Civil Aeronautics Board and covering the transportation of persons between Avalon, Santa Catalina Island, California, and points on the Mainland of California, and other points within the continental limits of the United States, of all tariffs of such transportation filed with the Civil Aeronautics Board by Wilmington Catalina Air Lines Limited, Catalina Air Transport, and United Air Lines, Incorporated, for the period November 1st, 1938 to and including the date of this certificate.

We ask that those, which are all bound together and fastened together with a certificate of their correctness, be marked as one exhibit.

The Clerk: Plaintiffs' Exhibit 2 introduced and filed into evidence.

Judge Orr: You are introducing them in evidence now, [fol. 320] are you?

Mr. Treadwell: Yes, Judge Orr; any objection?

Mr. Phelps: No objection.

Mr. Treadwell: May they deemed to have been read?

Judge Orr: May be admitted and so marked.

(Thereupon documents referred to were received in evidence and marked Plaintiffs' Exhibit No. 2.)

Mr. Treadwell: The third one is certified copy of the opinion and order of October 13, 1939 by the Civil Aeronautics Authority authorizing the issuance of certificate of public convenience and necessity to Wilmington Catalina Air Lines Limited for the transportation of persons and property between Wilmington, California, and Avalon Santa Catalina Island, California, and of such certificate.

Second, opinion and order of July 22, 1941, by the Civil Aeronautics Board authorizing the amendment of the certificates described in paragraph 1 hereof by reflecting a change in the carrier's name to Catalina Air Transport,

and by authorizing the carrier to engage in the transportation of persons and property between Los Angeles, California, and Avalon Santa Catalina Island, California, via Wilmington, Long Beach, California, and of such amended certificate.

Three. Order of June 23, 1942, by the Civil Aeronautics Board authorizing Catalina Air Transport to suspend service over its route described in paragraph 2 hereof.

[fol. 321] Those documents are all fastened together under the certificate, and we ask that they be admitted in evidence and marked Plaintiffs' Exhibit 3.

Judge Orr: If there be no objection, they may be admitted.

Mr. Phelps: No objection.

The Clerk: Plaintiffs' Exhibit 3 admitted and filed into evidence.

(Thereupon documents referred to were received in evidence and marked Plaintiffs' Exhibit No. 3.)

Mr. Treadwell: While Mr. Dillworth is on the stand, we also wish to introduce certified copies of U. S. Coast and Geodetic Survey maps of this territory involved and duly certified by the Department of Commerce as being on file in the United States Coast and Geodetic Survey. The first one is entitled San Diego to San Francisco Bay. I don't think it is feasible to exhibit them to the Court at this time. We ask they be admitted in evidence and marked Plaintiffs' Exhibit 4.

Judge Orr: Number 4. If no objection, they will be admitted.

Mr. Phelps: No objection.

The Clerk: Plaintiffs' Exhibit 4 introduced and filed into evidence.

(Thereupon documents referred to were received in evi-
[fol. 322] dence and marked Plaintiffs' Exhibit No. 4.)

Mr. Treadwell: The other one likewise duly certified by the Department of Commerce as being in the files of the United States Coast and Geodetic Survey entitled San Pedro Channel—it says here Palos Verdes Hills down to

Dana Point. We ask that be admitted in evidence as Plaintiffs' Exhibit 5.

Judge Orr: It may be admitted.

The Clerk: Plaintiffs' Exhibit 5 admitted and filed into evidence.

(Thereupon document referred to was received in evidence and marked Plaintiffs' Exhibit No. 5.)

Mr. Treadwell: Now, if the Court please, the parties were able to agree on certain facts in the case and they have been embodied in a brief statement of facts which reserve to the parties the right to introduce further evidence and is signed by the attorneys of the plaintiffs, the attorneys for the defendants, and the attorneys for the intervenor. There had been quite a bit of communication between the Public Utilities Commission and the Air Line on this subject and those letters are incorporated and attached to and made a part of the brief statement. We have three copies here for the Court, and we ask that it be admitted in evidence and be deemed read.

Judge Orr: In the absence of objection, it will be ad-
[fol. 323] mitted.

The Clerk: Plaintiffs' Exhibit 6 introduced and filed into evidence.

(Thereupon document referred to was received in evidence and marked Plaintiffs' Exhibit No. 6.)

Mr. Treadwell: I think that is all I want to ask you, Mr. Dillworth.

Judge Orr: Any cross-examination?

Mr. Phelps: I have none.

Judge Orr: You may be excused.

(Witness excused.)

Mr. Treadwell: Now one matter, Your Honors, that I will have to testify to, unfortunately, and I ask that I be permitted to be sworn.

EDWARD F. TREADWELL, called on behalf of the plaintiffs, sworn.

The Clerk:

Q. Please state your appearance for the record, sir?

A. I am Edward F. Treadwell and one of the attorneys for the plaintiffs in this case.

Direct examination.

Mr. Kelley:

Q. Mr. Treadwell, you recall a conference in the office of the chief counsel of the Public Utilities Commission on February 27, 1952?

[fol. 324] A. I do.

Q. Who was present at that time?

A. Judge McKaeg-, the chief counsel of the Commission, and it is hard for me to get the names—the gentleman right behind you.

Q. Mr. Phelps?

A. Mr. Phelps. Either Mr. Phelps or Mr. Kline. There was some change made just at that time, and they may have both been there, but they didn't figure particularly in it except that they might have been there. I couldn't say positively. I know that the matter was—there was a change in the Commission and Mr. Kline took over some of the duties of Mr. Phelps.

Q. Do you recall a conversation?

A. Wait a minute. Excuse me, I am sorry. There was also present at the time myself and my partner, Mr. Reginald S. Laughlin.

Q. Do you recall a conversation regarding this Catalina problem coming up at that time?

A. Yes, I do.

Q. Would you repeat what was said at that time?

A. Well, we had gone there on an engagement with them and to discuss some matters other than this Catalina Line, and those were discussed first and completed, and at that time we were familiar with these letters that had passed between the Commission and the Air Lines. Mr. Laughlin [fol. 325] said to Judge McKeage that we had been em-

ployed by the Air Lines to be associated with the Chicago attorneys of the Air Lines and that we would represent the Air Lines and he said that he would like to know what the Commission was going to do.

So Judge McKeage said that they had been considering the matter and that they planned to institute an inquiry—maybe the word is investigation—I rather think it was—an inquiry and investigation into the matter of the Catalina Air Line, and that if they found as a result of that investigation that the Air Lines had been collecting rates and fares which had not been filed with the Public Utilities Commission of California, the Public Utilities Commission would proceed to have actions brought to recover the penalties prescribed by the Public Utilities Act. He said that the Air Lines would have notice of any proceeding that was instituted or any inquiry or investigation that was instituted. He also said that they were fully aware of the fact that the Public Utilities Act did not name Air Lines in the penalty provisions of the Act, but he said that he was satisfied—they were satisfied that they could handle that matter.

I think that was it, practically the total conversation on the subject.

Q. In respect to these investigations, inquiries, you have an opinion as to what it would cost the company to handle such an investigation and carry the matter through all the [fol. 326] Courts to a final adjudication and determination thereof?

A. Yes, I think I have a general idea.

Q. What would that be?

A. Well, it would be far in excess of the $3,000.00 that we talked about.

Mr. Kelley: That is all.

Cross-examination.

Mr. Phelps:

Q. Now, Mr. Treadwell, I would like if you were able to, go back to certain events that preceded this conference which you just described, if you would. You are familiar,

I take it, with a decision rendered by the Commission, No. 45624, reported at 50 California Public Utilities Commission Reports?

A. Yes, I am familiar with it.

Mr. Phelps: Your Honors please, may I ask that these be received. They are advance sheet copies of that decision of the Commission and I will give Mr. Treadwell one for your present purposes, if I may.

A. I was not the attorney in that matter.

Mr. Phelps: Yes, I understand that, Mr. Treadwell. I will come to that in a moment. I think you said, though, that you are presently familiar with that decision.

A. Yes, sir, that's right.

Q. And I think you are also familiar with the fact that the [fol. 327] Commission's decision in that case was made the subject of a petition for a writ of review by United Air Lines to the California Supreme Court?

A. I understand that that was done. I was not a party to that.

Mr. Phelps: May I ask the Court to take judicial notice of the action of the California Supreme Court on that petition, which is recorded at 37 A. C.,—it is Advance California—633.

Q. Is it not true, Mr. Treadwell, that the California Supreme Court declined to review the Commission's decision?

A. Yes, they declined to review it.

Q. And thereafter did United Air Lines take an appeal to the United States Supreme Court?

A. They did.

Q. And that appeal was dismissed, was it not, by the United States Supreme Court?

A. That is my recollection as to how the matter was handled.

Mr. Phelps: May I ask that the Court take judicial notice of the opinion of the United States Supreme Court—rather the action—there was no opinion handed down—reported at 96 Lawyers' Edition Advance Opinions, page 228. That

decision was handed down, decision of the United States Supreme Court, on January 7th, 1952.

[fol. 328] Q. Now I think you indicated, Mr. Treadwell, that in that litigation United Air Lines was not represented by your office?

A. That's correct.

Q. They were represented, were they not, by a firm of attorneys in Los Angeles by the name of Trippet, Newcomb & Thomas?

A. That's correct.

Q. Now on or about January 23, 1952, was there not a complaint for certain penalties filed in Superior Court of the County of San Mateo in the name of the People of the State of California against United Air Lines and brought by the attorneys for the Commission?

A. That's correct.

Q. I will ask you to accept for present purposes the date of January 23 and I will introduce evidence of that date later on.

A. I think that is the correct date.

Q. Now it was at some time subsequent to the filing of that complaint, was it not, Mr. Treadwell, that your office was first retained by United Air Lines to represent them in this matter or in various matters involving the relations with the Commission?

A. It came in very closely around there. Of course I know it was before the 27th of February that we were employed.

[fol. 329] Q. May I ask you to assume for the moment —I will introduce evidence of it later—that it was some time between February 6th and February 27th that your office was retained by United Air Lines?

A. Subject to correction I will accept that at present.

Q. I think you indicated that prior to this conference of February 27 that you had some communication with someone in the Commission's legal division in order to arrange that conference, is that correct?

A. Yes, I think I contacted Judge McKeage personally. I am pretty sure that was the way it was handled.

Q. And I take it that you arranged at that time for the conference that took place on February 27th?

A. Yes.

Q. Now, Mr. Treadwell, you have before you, I think, a copy of the Commission's decision, 45624, to which I have referred, reported at page 563 of 50 California A. C. May I ask you to turn, please, to page 573 in this pamphlet and to refresh your recollection as to the contents of paragraph 2 of the order in that decision.

A. Now, you haven't made it clear. You ask if I was familiar with this. This has nothing to do with this Catalina.

Q. I understand.

A. What do you want me to look at, paragraph 2?

[fol. 330] Q. Paragraph 2. That is the paragraph, is it not, in which the Commission ordered United Air Lines and certain others to make reparation of certain fares.

A. Well, I would like to make an objection to the matter as being entirely immaterial. It referred to coach fare. That is, in this decision. It had to do with a coach fare, Your Honors.

Mr. Phelps: If Your Honors please, if I may be heard a moment as to the purpose of the question. I am only trying to have described for the record certain events which preceded this conversation and which I think may have been the cause of its being arranged and the subject matter of it. I think it is important for the Court to know some of these events that preceded this conference.

The Witness: Well, of course I thought that you might be trying to prove some estoppel or some——

Mr. Phelps: I assure you I am not, Mr. Treadwell.

The Witness: Or res judicata, or something. I don't think there is any harm in the Court knowing about it.

Judge Orr: You are withdrawing your objection?

The Witness: I will withdraw the objection, with counsel's statement.

Mr. Phelps:

Q. Well, having in mind, Mr. Treadwell, paragraph 2 of that order and having in mind the fact that this penalty action had been brought on January 23, can we not con-

[fol. 331] clude that those were matters with which you were then concerned?

A. Yes. We understood the matter. We were not attorneys in the matter of the coach fare at all.

Q. I understand.

A. But to supplement possibly what I have already said, I am pretty sure that we told you, Judge McKeage, that we would handle it, be associated in the matter of the reparations demanded by the State in regard to the coach fare.

Q. And you also had some conversation, had you not, involving as the subject matter this pending penalty action, had you not?

A. I don't think that we discussed it, except in one particular. Judge McKeage voluntarily told us that he knew all about the fact that the Air Lines were not named in the Act regarding the penalties, and we made no comment. We knew that, too. And it has since been decided by the Superior Courts that the Air Lines are not liable to the penalty. They have discussed it to that extent. Also it was discussed, to this extent, that we asked for an extension of time to put a pleading into the complaint and Judge McKeage very nicely granted that on our behalf.

Q. Yes. You had previously prepared a stipulation extending the time within which the defendant in the penalty action might file a pleading, had you not?

[fol. 332] A. That's right.

Mr. Ozment: Your Honors, without objecting at this time, may I inquire from counsel as to where this inquiry is leading us? Mr. Treadwell already testified as to why he attended this conference, and it seems to me that most of these matters are wholly irrelevant and are unnecessarily cluttering up the record.

Mr. Phelps: I should like to be heard on that, if Your Honors please, before ruling is made.

Judge Orr: We are a bit confused just where this evidence is leading us. As we understand it, the testimony of Mr. Treadwell was for the purpose of showing that a statement—I don't know whether it would be a threat or not—was made on the part of the Commission to make an investigation and take appropriate action on these penalties.

Your purpose is for what; what do you want to show?

Mr. Phelps: It seems to me, if Your Honors please, that what occurred at this conversation is of very considerable importance here. It would seem that that conversation is being used by the plaintiffs as the evidence in support of the allegation appearing in the complaint that these defendants have threatened to bring penalty actions and many other dire things. So I would like to explore thoroughly the circumstances of that conversation, what was said, who was present, and bring before this Court as completely as is [fol. 333] possible to do all of the circumstances surrounding that conversation.

Judge Orr: You take the position that there was no threat then to take action to collect these penalties?

Mr. Phelps: Indeed we do, Your Honor.

Judge Orr: And the purpose of your cross-examination, you think, is to show that the statement as testified to by Mr. Treadwell did not have that effect? That is, as to the conversation as a whole—looking at the conversation as a whole?

Mr. Phelps: Yes. And Mr. Treadwell's recollection of what was said is not quite accurate.

Mr. Ozment: Your Honor, I gathered that counsel in effect is saying that Mr. Treadwell mistakenly thought that the statement which was made to him applied to the Santa Catalina operation, whereas counsel apparently concludes that it applied to something else. If that is his point, I suggest that he simply ask Mr. Treadwell about that and let's get on.

Judge Murphy: This case isn't going to be decided on the resolution of whether a threat was made or not. Is it?

Mr. Phelps: Well, it seems to me, Your Honor, that is an important issue.

Judge Murphy: I don't think it is.

Mr. Phelps: In view of this complaint here, which rings [fol. 334] with the allegations of irreparable damage to these plaintiffs, and with the nature of the threats that have been made by the defendants here, it seems to me that it is important. Those allegations have been denied and made issues of fact. It seems to me important for us to know

what the facts were as to what occurred between the Commission and the plaintiffs.

Judge Goodman: If the State of California has not made any threats to enforce the Statute, why are we here listening to this case? If you say you are not going to do that, why then, we will dismiss this action. It seems to me a lot of unnecessary waste of judicial time, if that is the case. If the State of California does not intend to enforce the Statute against the United Air Lines, why, then, there is no occasion for us hearing the matter, and if you state the State of California is not going to take steps it is claimed they are going to take, why, that will be the end of the matter, the case becomes moot.

Mr. Phelps: Well, if Your Honor please, if you are prepared to hear me on that at this moment, I would be glad to be heard. I did plan to call to the stand Judge McKeage, the Commission attorney and chief counsel, and have him state not only what he intended to do prior to the time this action was brought but what he would do in the event this Court declined to grant relief requested, and to describe [fol. 335] exactly the nature of the action the Commission would take.

Judge Murphy: That is all we are interested in.

Judge Goodman: That is all we are interested in hearing. If the State of California isn't going to assume jurisdiction, isn't going to take any steps that might involve the necessity of deciding the question of whatever the State or Federal Government has in these matters, there isn't any occasion for us to take any action, and I suppose under those conditions Mr. Treadwell would go away very happy then.

Mr. Phelps: I did not mean to mislead, Your Honor. I did not mean to say that the Commission was planning to take no action whatever in regard to this Catalina flight, but that the action which it has contemplated and now contemplates is a wholly different kind of action from that alleged in this complaint.

Judge Murphy: Why don't you tell us what this is right now and save us a lot of time?

Mr. Phelps: I shall be glad to call Judge McKeage.

Judge Murphy: I don't require any testimony. You are

here representing as counsel. If you will tell what it is, we will know what it is and we won't be listening in the dark.

Mr. Phelps: Very well. I think Judge McKeage would [fol. 336] testify, and I think I can say as counsel, that had this complaint not been brought the Commission would have brought an investigation on its own motion into the operations and practices of United Air Lines and the other plaintiff, Catalina Air Transport, hold a public hearing, after notice to parties, and determine for itself after that hearing and after argument whether or not under all the circumstances and under all of the law applicable whether it had jurisdiction. If it decided that it did not have jurisdiction, which is a possibility, Your Honors, that would end the matter. If it decided that it did, then presumably the aggrieved parties would file a petition for writ of review to the California Supreme Court and if the California Supreme Court reversed the Commission's decision, presumably that would end the matter. If the California Supreme Court affirmed the Commission's decision, presumably the plaintiff would take the matter to the United States Supreme Court and there you would have the final determination of the matter. If the United States Supreme Court affirmed the Commission's jurisdiction and the Commission's decision, the Commission then would allow a reasonable time to the parties to file their tariffs covering this Catalina operation. Presumably the parties then would be quite willing, once the matter had been decided, to file those tariffs and there would be no necessity then for any further action by anybody and it would be only in that [fol. 337] remote unlikely event that after a final determination of the matter by the United States Supreme Court that these parties wilfully refused to file their tariffs that the Commission then would consider what further action should be taken.

Judge Goodman: The upshot of that is, you say, there is no ground for the equity injunctive relief at this time?

Mr. Phelps: Precisely.

Judge Orr: What about the penalty between now and the determination?

Mr. Phelps: I think I can say——

Judge Orr: What about that?

Mr. Phelps: I think I can say for Judge McKeage that the Commission would not consider—would consider it unthinkable to bring any penalty actions against these parties.

Judge Orr: It seems to me——

Mr. Phelps: Pending final determination.

Judge Orr: I get the idea here, the concern of the Air Line Company is this, that during the pendency of this action and the long drawn out litigation which may ensue that those penalties are building up all the time and that the Commission would then, in the event they were held that the Commission had authority, that they would be liable for all of these penalties which accrued in the meantime.

[fol. 338] Mr. Phelps: That is a wholly unfounded apprehension, Your Honor.

Mr. Murphy: Why couldn't the parties settle that between themselves and avoid this litigation at the time?

Judge Orr: I think——

Mr. Murphy: Why not go ahead and hold your Commission hearing and so stipulate that——

Judge Orr: May I interrupt? May I ask a question of Mr. Treadwell here, please? Isn't that your concern, that these penalties are building up in the meantime?

Mr. Treadwell: That is certainly one of our concerns, Your Honor.

Judge Orr: It is one of the greatest, isn't it?

Mr. Treadwell: One of the greatest. In this suit that they filed in January, in which—and which we knew about at the time we held this conference—they sued the company for $138,000 on an allegation that—and a finding by the Commission itself—that the rates were put in force by the company for 69 days.

Judge Murphy: Can't you enter into a stipulation with respect to those penalties?

Mr. Phelps: I am not sure I understand what you mean by "with respect to these penalties".

Judge Orr: Stipulate to the effect that the Commission, in the event it is finally determined by the Courts that they

[fol. 339] have jurisdiction thereof, will not proceed against the Air Line Company for penalties which may have accrued theretofore.

Mr. Phelps: I think so. I would like to consult for a moment with chief counsel on that.

(Off the record discussion, beyond the hearing of the Reporter.)

Mr. Phelps: Yes, Your Honor, we freely stipulate that the Commission would bring no penalty actions against United Air Lines or Catalina Air Transport with respect to their failure to file tariffs covering this Catalina operation, except in the sole circumstance that after a final determination of the jurisdictional question which would be resolved in favor of the Commission's jurisdiction that then these parties refused, after a reasonable time, to file the tariffs, would such a penalty action be brought or considered?

Judge Goodman: And then only for the period following the wilful refusal?

Mr. Phelps: Following the wilful refusal, yes, Your Honor.

Judge Murphy: Are you willing to accept that stipulation, Mr. Treadwell?

Mr. Treadwell: No, Your Honor, I am not. The penalties are not a matter of the Commission. They are a matter of the State of California. The State of California is entitled to any penalties and they can only be recovered [fol. 340] by an action in the name of the people of the State of California or litigated, and the Commission is not given any discretion at all. It is required to collect the penalties and bring suit in the name of the people of the State, and its attorneys are given power to use the name of the State to recover the penalties. They have no power to make any such stipulation.

Not only that, Your Honor, this matter of threats is entirely material. This is an action for declaratory relief. We are entitled to declaratory relief against these charges. and I couldn't make any such stipulation here. I would have to consult my clients.

Judge Goodman: Mr. Treadwell, in an action for declaratory relief you would have to show that there was a factual controversy, and this statement to the Court would indicate that there is no factual controversy, at least concerning the subject matter which is the basis of your action for equitable relief, namely, that some action is going to be taken.

Mr. Treadwell: Well, the controversy is whether they have power to regulate this route and regulate the rates.

Judge Goodman: That is only an academic controversy. The Courts are not here to determine academically whether the United States or the State has jurisdiction, but only to resolve a controversy that might arise. Now, if the controversy does not exist, there is no basis for a judi- [fol. 341] cial action. Isn't that true?

Mr. Treadwell: The controversy, Your Honor,—. I have introduced, though I haven't read here, letters from the Commission deciding this thing their own way and saying that they claim the right to regulate the rates. That is the controversy.

Judge Orr: I understand they are going to take Court action. They are not deciding it their own way. They are going to take Court action. They will make a determination and you will take it to the Courts to determine whether that is correct or not.

Mr. Treadwell: You can't even take it to the Courts. The only thing you can take to the Courts is where confiscation is involved. You can't get into Court at all. No Court can review the order of the Commission. It just stands for what it is worth and you can't go to Court on anything except confiscation under the Constitution of California.

Judge Orr: You mean an order of this Commission is not reviewable?

Mr. Treadwell: No, Your Honor, it is expressly provided by the Constitution that it is only reviewable on the question of confiscation, not reviewable on any other ground.

Mr. Phelps: May I be heard on that, Your Honor? It is [fol. 342] incomprehensible to me that Mr. Treadwell——

Judge Orr: You gentlemen can sit down.

Mr. Phelps: Mr. Treadwell has said it on argument on prior occasions and he has said it in his brief and he is

saying it again. I can't understand it. There is an express provision in the Public Utilities Code, if Your Honors please, providing machinery for review of Commission decisions. I will refer you to the sections. I think it is appropriate to read it right now because we have had repeated assertions from Mr. Treadwell that there is no review of Commission decisions.

Mr. Treadwell: While you are looking for that——

Mr. Phelps: I have it.

Mr. Treadwell: ——I can say other things. There are all kinds of remedies, Your Honor, that the Commission has. Penalties is not the only one. They can sue you for reparations, make us repay all the rates that we had collected since 1938 to the present time. They also are permitted to impose interest and also damages in the way of vindictive damages that they can hold us to also. None of those things has the Commission any power to give up. They haven't any power at all. If this thing is going to come up as a proposition for a stipulation, why, naturally I would have to submit it to my clients.

Judge Goodman: Do you see any reason why you couldn't [fol. 343] do that?

Mr. Treadwell: I don't see any reason why we should do it.

Judge Goodman: The same people that you say made the threats which are the basis for your demand for equitable relief now say that they are not going to do the things that they threatened to do, the very same people.

Mr. Treadwell: Well, as I say, Your Honor,——

Judge Goodman: So by that same token, if the basis of your equitable action is a threat that counsel for the Commission made, and I would think that since we are sitting here in equity, that their statement that they are not going to do that would pretty well knock the props out from the basis of the demand for equitable action, wouldn't it?

Judge Orr: I don't quite get your theory, Mr. Treadwell. You allege in your complaint that this Commission is going to do certain things. Now they are willing to stipulate they won't do it. You say, no, that they are not in a position to deny the allegations that they are going to take this action.

Mr. Treadwell: That is the position I take, that they have no power, that they have power to do just a certain thing, Your Honor, that they have a power to collect by suit in the Superior Court these penalties, reparations and interest and vindictive damages.

[fol. 344] Judge Murphy: Where is the requirement that forces them to sue if they do not care to?

Mr. Treadwell: The Statute says they shall collect these penalties.

Mr. Phelps: I should like to be heard on that, if Your Honor please.

Judge Murphy: If they arrive at a conclusion there are no penalties due——

Mr. Treadwell: Oh, yes, that would be all right, that is just what they don't do.

Judge Murphy: They said they, as I understood, Mr. Treadwell, Mr. Phelps said they contemplate an investigation to determine that. Isn't that correct?

Mr. Phelps: Quite, Your Honor. We do not consider that there are any penalties due at the present time.

Mr. Ozment: Your Honor, might I be heard?

Mr. Treadwell: I didn't quite get that. You say—. Would you just read that, Mr. Reporter?

Judge Orr: Read that statement of Mr. Phelps.

(Thereupon the Reporter read statement of Mr. Phelps: "Quite, Your Honor. We do not consider that there are any penalties due at the present time.")

Mr. Treadwell: Well, Your Honor, counsel in the same situation has an appeal pending from this case that they [fol. 345] brought suit for penalties, which they lost, and they are still appealing and arguing on their appeal that the penalties are due.

Judge Murphy: That is some other situation, however, isn't it?

Mr. Treadwell: The situation is just the same. The question is whether the act makes the Air Lines liable. Now he is saying that he is conceding that whole thing. I can't believe that he means it because he has written a very elaborate brief.

Judge Murphy: Well, suppose we let him be heard on the subject.

Mr. Ozment: We have a much more fundamental objection to what is being said here. Our position is that the Commission now stands in open Court saying that they will institute a proceeding before themselves, that that and that alone is enough to warrant and require the Court to act in this matter. The burden of appearing and defending before the California Commission is sufficient. Mr. Treadwell has testified that this is to be considerable expense. In support of that point we rely on three rather recent Supreme Court cases involving this type of situation. We have prepared a supplemental memorandum, which, if the Court will accept at this time, which we'll present and I think perhaps will be a little easier to see the basis of [fol. 346] our argument on this point. The first of those cases is Brice against Santa Fe Elevator Corporation, and there a complaint was filed with the Illinois Regulatory Commission. The Utility against whom it was filed moved to dismiss the complaint on the ground of lack of jurisdiction. The Illinois Commission refused to dismiss on the ground of lack of jurisdiction. It went ahead to determine their jurisdiction in the matter. And the parties immediately went into a Federal Court and sought and obtained both declaratory and injunctive relief on the ground the Federal Government had preempted the field of regulation.

A very similar case is the Public Utilities Commission of Ohio against United Fuel Gas Company. There much the same thing happened. The Commission refused to dismiss their proceeding and directed the utility to appear and defend. And the Court said that since there was—it would cost the company $3,000 to respond to the directive of the State Utility Commission that the case properly instituted and maintained and relief was properly granted.

And in the same vein we have a third case, Bethlehem Steel Company against New York State Labor 330 U. S., where the Federal Court took jursdiction in connection with the issuance of a subpoena.

This case is ripe for decision. The Commission stands stating it will institute a proceeding, and we submit that [fol. 347] that and that alone is enough for the Court to

take and decide this case either on the basis of declaratory or injunctive relief. We are not greatly concerned as to what form the judgment will take.

Judge Orr: That is a different angle.

Mr. Phelps: If we may have the privilege of replying to that, Your Honor. I would like to take Mr. Treadwell's points first. I was going to read the provisions of the California Public Utilities Code providing machinery for review of Commission decision. Section 1756 is as follows:

> "Within thirty days after the application for a re-hearing is denied"——

That is re-hearing by the Commission——

> "or if the application is granted, then within thirty days after the decision on re-hearing the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on re-hearing inquired into and determined."

Section 1757 is as follows:

> "No new or additional evidence may be introduced in the Supreme Court but the cause shall be heard on the record of the Commission as certified to by it. The review shall not be extended further than to de-
> [fol. 348] termine whether the decision has been rendered pursuant to its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review except as provided in this Article. Such questions of fact shall include ultimate facts and findings and conclusions of the Commission on reasonableness and discrimination."

The exception just referred to appears in Section 1760, which is as follows:

> "In any proceeding wherein the validity of any order or decision is challenged on the ground that its violates

any right of the petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts and the findings or conclusions of the Commission material to the determination of the Constitutional question shall not be final."

Now that seems to be, Your Honor, and affords a complete method of review of any Commission decision, which I may say has been made use of many times. We have 15 or so cases now in the California Supreme Court involving review of the Commission's decisions. If the Commission' [fol. 349] proceeds first by way of seeking a penalty action, then the matter proceeds in the usual way, through the hierarchy of the California State Courts, reviewed to the District Court of Appeal, and with the possibility of a transfer to the California Supreme Court under certain' circumstances.

So no matter what the Commission does, whatever action it may take, it is open to adequate review in the courts of the State of California.

So I am utterly unable to understand how Mr. Treadwell could have overlooked the sections I have just read.

Mr. Treadwell: Would you read the Section of the Constitution which refers to confiscation?

Judge Orr: Maybe you can argue that, Mr. Treadwell.

Mr. Phelps: I am fully aware of that Section. Mr. Treadwell, it is true there is a section of the Constitution that contains absolute prohibition against transportation companies raising any rate without a prior showing before the Commission that an increase is justified, and then it goes on to say: "And the finding of the Commission on that question shall not be subject to review except on the question of confiscation."

It is restricted entirely to the question of increases in rates, and it is by no means intended to restrict review of Commission decisions on other matters.

[fol. 350] Now Mr. Treadwell has indicated that the Commission has no alternative but to bring a penalty suit, that it has a duty. It may be, Your Honors, that the statute is couched in terms of a duty, but as a practical matter

we all know that the Commission of necessity must exercise discretion in the matter of bringing these penalties. If they were bound to bring a penalty action for every transgression of every provision of the Public Utilities Act, well, I assure Your Honors there would be literally millions of such penalty actions at any given time. So the practical necessities of the situation are such that the Commission must, and always has, and I am sure always will, exercise its judgment as to whether or not penalty actions are appropriate in a given set of circumstances.

And when I have stated, I think, on behalf of Judge McKeage, that the Commission—and have offered to stipulate that the Commission would not bring these penalty actions except under the circumstances I have described, I am sure that no one could ever successfully challenge the Commission's right to exercise that kind of discretion.

Now if I may reply to what——

Judge Orr: Do you want to reply to Mr. Ozment?

Mr. Phelps: Yes.

Judge Orr: Well, we will have a ten minute recess.

(Short recess taken.)

[fol. 351] Judge Orr: We might indicate to you that we see no reason to go further, have further evidence on the question of whether or not the Commission is going to impose penalty or what action they are going to take, other than the situation os advanced by counsel for the Government as to whether or not an investigation, if instituted by the Commission, or threatened investigation, would be of such character as to warrant intervention by this Court. We think that the representation as made by the California Public Utilities Commission as to those other matters would be sufficient to warrant this Court in denying relief along those lines.

However, the other matter which counsel for the Government has advanced here on the question of whether or not the mere fact of requiring the air lines to appear in an investigation would be sufficient to require the intervention of this Court, if they make an investigation, why, I suppose as to whether or not the air lines would appear there, would be a matter for them to decide, but we are not

familiar with those cases which have been cited here, and we would of course like to become familiar with them. We see no reason to take up the time of this Court on those other matters, in view of the representation which has been made to this Court.

Mr. Phelps: Very well, Your Honor. Would you like to [fol. 352] hear me in argument now on the question of whether or not the Court should entertain requests for declaratory relief as indicated by counsel for the Civil Aeronautics Board?

Judge Orr: On that one question as advanced by counsel for the Civil Aeronautics Board.

Now, if counsel for the air lines wants to argue that point, why, they may do so, and if they want to take——

Mr. Kelley: He is through with Mr. Treadwell now.

Judge Orr: Now if you want to participate in this argument, Mr. Treadwell, you may.

Mr. Treadwell: I would like to be heard briefly. I recognize Your Honors' efforts to solve this case. The facts of the situation are simply these, that the Commission raised this question of its jurisdiction over this route. They decided it apparently because the Commission wrote letters saying that they had jurisdiction, and they informed us that they were going to exercise that jurisdiction and we bring this suit.

If there were no penalties at all—that is just an incidental—of course, it is a very important incident, as Your Honor said to me, and I said to Your Honor that that is one of our troubles, but it isn't the only trouble. This is the thing that should be settled. We should know who controls this route and whom we have to look to and who has the right to say what rates we shall collect, and there [fol. 353] is ample jurisdiction of the Court for a declaratory judgment even if it were not for injunctive relief.

But I don't think there is anything in that either. In other words, they could come in and we would have a situation where all kind of liability is involved. They can—there is liability for the rates you collect—they can all be sued for and recovered; there is interest. And so we bring this suit.

Judge Murphy: But, Mr. Treadwell, the State of California has changed its position now.

Mr. Treadwell: Well, has it, Your Honor?

Judge Murphy: They come in now and say they are not going to do this until they have a hearing now and investigate the matter. So you are no longer confronted with the so-called threat or claim of jurisdiction which is contained in these letters attached to the stipulation.

Mr. Treadwell: At the time we brought this suit there was no question that they were threatening to do these things, do anything that was——. Now they come in and they ask in their answer, say in their answer that they are not going to collect the penalties until it is determined on a hearing. Now they come in on the trial and say something entirely different.

As I understand it, so there won't be any mistake about it, what they are suggesting is that they will not take any [fol. 354] proceedings to collect any penalties until there is a final decision in some proceeding that they are going to commence, and when they do impose any penalty they won't impose any penalties except such as that accruing after such a final decision and a contumacious refusal on our part to do so.

Judge Orr: That is the way we understand it.

Mr. Treadwell: Yes.

I say, Your Honor, that it might seem that such an offer as that, I ought to accept it. I don't accept it, Your Honor, because we want nothing but what the law is.

Judge Orr: What you want is protection.

Mr. Treadwell: What we want is protection.

Judge Orr: From any action which they—any threatened action, and if there is no threatened action, then you are protected.

Mr. Treadwell: Well, I can't say if there isn't any, because I don't think they have any power at all to make any such a stipulation.

Judge Orr: Suppose this Court determines from the evidence in the case what the situation is; suppose this Court is of the opinion that the proceedings of this Commission here in open court and the statement outweighs your testimony that at a certain time they said that; then the Court

would say that you have not prevailed in your assertion [fol. 355] on that point.

Mr. Treadwell: Well, if on that point——

Judge Orr: That your apprehensions as to what might they do has not been established; that we take in good faith the statement of this Commission that they are not going to do anything of that kind and had no intention of doing it—which we must weigh in the balance with your statement that at a previous time some other assertion was made.

So that is the position we take.

Mr. Treadwell: Of course, Your Honor, if it is a question of my entering into a stipulation, I would necessarily want time.

Judge Orr: you wouldn't—why would you—why would you need to enter into any stipulation at all? What we are talking about is a statement to this Court denying and stating that they are not going to go into these things. You wouldn't need to be a party to that.

Mr. Treadwell: Of course, it is a new law suit, as far as I am concerned. They coming into court today and trying to get out of the case and get the case disposed of in a certain way, it is just as harmful if it is done by the Court as if it were done by them to me. But I want time to consider it.

Judge Orr: Would you like to argue that other point [fol. 356] now, Mr. Treadwell, the question of the mere fact that they will conduct an investigation, will that be sufficient to require the intervention of this Court?

Mr. Treadwell: It will be ample, sufficient. I have seen cases that the Government has cited. This thing does not depend upon the penalties, the penalties alone. The fact is that there is a dispute that arises here, the fact that Congress wanted to provide a way by declaratory judgment that these disputes could be disposed of, and we are here in court asking for it. Just because they come in and make this stipulation, that does not give us the adjudication on the merits of the question, and that is what we are here for.

Judge Goodman: Well, suppose the Commission has a change of heart, Mr. McKeage and his associates decide

that maybe the State shouldn't exercise jurisdiction here at all, after they conduct this hearing, and you don't have any trouble on that score. You are not hurt until the dog really bites. He may bark at you a little bit, and he turns out to be not as ferocious as he seemed to be.

Mr. Treadwell: Far from me to——

Judge Goodman: What have you got to complain about then?

Mr. Treadwell: Well, Your Honor, I have the old idea: "Beware of the Gods"——

[fol. 357] Judge Murphy: "Who bring gifts".

Mr. Treadwell: "—that come with gifts." They are not giving me anything, Your Honor. They brought this suit for $178,000.

Judge Orr: Against whom?

Mr. Treadwell: Against the United Air Lines.

Judge Goodman: That did not involve the route to Santa Catalina Island.

Mr. Treadwell: It didn't, but it involved the Civil Aeronautics Board. The President of the Civil Aeronautics Board, the Chairman of the Board, asked that the rates be put into effect. The company put them into effect. The Utilities Commission itself found that that was deemed a demand to put them into effect, a demand that they had to obey, and they put them into effect, and then the Utilities Commission brings the suit for $138,000, $2,000 a day, because the rates which they had held were reasonable and were required and that were put into effect on the demand of the Civil Aeronautics Board, but still we should be charged $138,000.'

Judge Orr: Had they ever made in that case any representation to the Court that they would not take certain action?

Mr. Treadwell: No, Your Honor.

Judge Orr: That differentiates this case from that.

[fol. 358] Mr. Treadwell: It doesn't in my way of thinking, Your Honor, because there is no extent that they won't go to if they legally can, and this is not criticism for a public official if he goes as far as he can, and he could repudiate this. But if it is a question as to whether we should stipulate to anything of that kind, I would want time,

Your Honor, to have this matter go over to some future time.

Judge Orr: I guess you are rather anxious to get it completed?

Mr. Treadwell: I am very anxious to get it completed, Your Honor, but we have done tremendous work in this case. They presumably have done tremendous work. To through the case out without any decision on some promise or other that they will do something that seems liberal, I don't think is right. So I know what Your Honor's are trying to do is what is right and fair and——

Judge Orr: It isn't any indication of any promise or anything. It is a question here of evidence. You are asserting they are going to do these things and you are placing that solely so far on your testimony that they made that statement to you at a meeting. They now come in and say they are not.

Now, this Court can weigh that evidence and make a determination as to whom it believes under the circumstances. It isn't a question of throwing it out on any statement. It would be the question of throwing it out on a [fol. 359] lack of sustaining your point.

Mr. Treadwell: No, it isn't. They haven't said anything, Your Honor. They say that they claim that they had a right to regulate these rates of this line. They say that now in their answer before the Court. Well, isn't that what we want to get a decision on, whether they have that right or not to regulate these rates at all, and we come into court and ask to have——

Of course, the fact that they say they want to exercise penalties and collect penalties, of course, that is something, but it does not come to the thing that we are trying to decide.

Judge Goodman: But they now repudiate the statement. They have changed the statement that they made that they are going to assert jurisdiction because in effect they have changed their mind on it. They are first going to conduct a hearing before they make a decision on that.

Now until they decide that they are going to assert jurisdiction, is there any controversy?

Mr. Treadwell: Certainly, there is a controversy. You have the controversy if you don't get the final decision. The controversy isn't one that has to be decided in any one way. It can be decided either way. They say that they have, and we say that they haven't, and that is the [fol. 360] controversy.

Judge Goodman: Mr. Treadwell, wouldn't it be time enough to determine that question when and if the California Public Utilities Commission decides after a hearing that it is going to assert jurisdiction?

Mr. Treadwell: Even, Your Honor, after we had this conversation they never brought any proceeding to determine it. The penalties that have accrued in this matter amount to $730,000 a year.

Judge Orr: This one here?

Mr. Treadwell: This one here. This little line.

Judge Orr: It might be——

Mr. Treadwell: $730,000 a year has been accruing on this line.

Judge Orr: That would be evidence to me that you ought to be rather anxious, rather pleased to accept this statement because you don't know with any certainty that you are going to win this case, and then they might assert all of these penalties all the way back if you didn't win it. Now they say they won't do it on this other situation. It might mean $780,000 to you.

Mr. Treadwell: I am not saying——

Judge Orr: Unless you are absolutely positive that you are going to win. Of course, that would be a different thing. But the penalties that already have accrued, in the [fol. 361] event you lose, why, they are going to waive those.

Mr. Treadwell: What I am asking for now is that if my clients want to accept some kind of a thing of that kind as a substitute for a determination of this question, well then they ought to have the opportunity to do so.

Judge Goodman: Wouldn't they be protected if this Court made an order stating that: Dismiss this case for equitable relief upon the representation and statement of the officials of the State of California that the action that was threatened is not going to be taken now? What dif-

ference does it make whether you stipulate or whether your clients like it or not? The decree of the Court would still have some validity.

Mr. Treadwell: I have given my views, that it does not touch the issue at all as to what the right is, and that is what we are interested in.

Judge Goodman: Well, the answer to that is that if you do what I have seen happen a great many times in the Federal District Court, that people do come in and when they get a determination of their rights in advance and without any actual controversy then existing—and that is nice—I would like to do that too, as a lawyer—and it would be a good job for my clients if I could do that—but the courts are not here for that purpose. They don't decide those questions unless there is an actual controversy.

[fol. 362] Mr. Treadwell: Isn't the controversy still here as to who has jurisdiction?

Judge Goodman: It might have been at the time you filed your suit but it isn't now because they say they are not going to do the things you claim.

Mr. Treadwell: No, they don't. Excuse me, please, Your Honor. They say they won't collect penalties until it is finally decided and they say that when they do collect them——

Judge Goodman: They won't assert rights or collect penalties or take any action until it is determined whether or not they have jurisdiction.

Mr. Treadwell: In other words, they want to oust this Court of jurisdiction by simply saying that they are not going to do anything until they get around to deciding it. They have already decided it.

Judge Murphy: How would that oust this Court of jurisdiction? Couldn't you renew your action for the relief which you seek in the event that they decided adversely?

Mr. Treadwell: Well, I suppose I could.

Judge Murphy: Suppose that we were to postpone decision and thus retained your station until such time as the investigation is had and determined?

Judge Goodman: Following Judge Murphy's suggestion, how could you possibly be, or the litigants, if we retained

[fol. 363] jurisdiction of this matter and postponed it until we see—or until such time as it results whether or not the California Public Utilities Commission is going to take the steps that you attribute to them, and at that time you could renew your application.

Mr. Treadwell: Your Honor knows that they have decided—Your Honor knows that if they bring a proceeding, just exactly what they are going to decide.

Judge Murphy: We don't know that.

Mr. Treadwell: Well, I have put in evidence the letters here in which they have decided the whole matter, claim they have.

Judge Murphy: Well, upon the representation of Mr. Phelps, he stated very frankly that if an investigation were commenced it might well be that no further action would be taken. Is that correct?

Mr. Phelps: Yes, Your Honor, that's a possibility.

Mr. Treadwell: If Your Honor please, what I want to do, I ask that the matter go over for a reasonable length of time so we can discuss this matter, and give to the Court any——

Judge Murphy: Suppose we were to continue this matter sine die, until such time as the results of the investigation contemplated by Mr. Phelps are determined. Then if the result of their investigation is adverse to your position, [fol. 364] there would then be an actual controversy upon which we could act.

Mr. Treadwell: There is an actual controversy now. They haven't come in here and told Your Honors that they don't— The controversy is simply that there are two conflicting contentions. They make the contention that they are entitled to establish these rates and regulate them.

Judge Orr: Have you got any more evidence, Mr. Treadwell?

Judge Goodman: Aside from this?

Mr. Treadwell: No, Your Honor, we are through.

Judge Orr: No further evidence?

Mr. Treadwell: No.

Judge Orr: Mr. Phelps, would you call your witness and have him state to the Court what the position of the Commission is, as you have indicated?

Mr. Phelps: I would be glad to.
Judge Orr: All right.
Mr. Phelps: May I talk to him briefly?

(Discussion outside of the hearing of the Court.)

Everett C. McKeage was called as a witness on behalf of the defendants, sworn.

The Clerk:

Q. Please state your full name to the Court, sir?
[fol. 365] A. Everett C. McKeage.

Direct examination.

Mr. Phelps:

Q. You are one of the defendants in this case?
A. I am.
Q. What is your occupation?
A. I am the attorney and chief counsel of the Public Utilities Commission of the State of California.
Q. And how long have you been such?
A. I have been such since January 1944.
Q. I take it the title "Judge" derives from some prior experience that you had?
A. I was at one time Judge of the Superior Court of the State of California in and for the City and County of San Francisco.
Q. May I ask you, Judge, if there are set forth within a section of the Public Utilities Code a description of your duties as attorney and chief counsel?
A. Yes.
Q. I refer to Section 307 and ask you whether or not that is the section which in your opinion guides you in your discharge of your duties?
A. Those are the statutory duties that I perform.
Mr. Phelps: I think it perhaps might be well to read this so we have before us the limit of the duties and [fol. 366] responsibilities of the Commission's attorney.

Section 307, as follows:

"The Commission may appoint as attorney to the Commission an attorney at law of the State who shall hold office during the pleasure of the Commission. The Attorney shall represent and appear for the People of the State of California and the Commission in all actions and proceedings involving any question under this Paragraph or under any order or Act of the Commission. If directed to do so by the Commission he shall intervene, if possible, in any action or proceeding in which any such question is involved. The attorney shall commence prosecution and expedite the final determination of all actions and proceedings directed or authorized by the Commission, advise the Commission and each Commissioner, when so requested, in regard to all matters in connection with the powers and duties of the Commission, and the members thereof, and generally perform all duties and services as attorney for the Commission which the Commission may require of him."

Now if I may, Your Honor, I should like to make sure the record is clear in regard to an observation Judge Goodman made, that the Commission had changed it- position or attitude. I would like to inquire of Judge McKeage— [fol. 367] I think we can establish the fact that the Commission has not changed its attitude but that what has been said was perhaps misunderstood.

Judge Goodman: Before you do that, so that is clear, the answer of the defendants sets up certain issues in this case, and in addition by stipulation there was a letter attached in the file which stated that the Commission was enforcing jurisdiction, asserting jurisdiction, and requesting the plaintiff to file its schedules.

Mr. Phelps: That's correct.

Judge Goodman: Now you are stating that the Commission did not intend to assert jurisdiction until such *as* a hearing was had, and you also said it might be possible that they might come to the conclusion that they wouldn't assert jurisdiction. It was that which prompted me to say that a different statement had been made in court here

than was set forth in the answer, or by the pleadings. I did not intend, by that statement, to intimate that there was anything unfavorable or critical in saying that there was a change of position.

Mr. Phelps:

Q. I shall just ask the Judge to describe what the position of the Commission, with respect to this Catalina operation, was prior to the bringing of this suit and what it is now.

[fol. 368] Mr. Treadwell: We object to that, Your Honor. This is calling for the conclusion of the witness. The position of the Commission is shown by the answer which we are trying this case on. It shows exactly what it's position is, and it is also shown by the letters written by the Commission, the Commmission's Secretary, insisting in their right to regulate this line, these rates, and it is also shown in a certain way by certain testimony of mine. I don't think the witness could give his conclusion.

Judge Orr: The objection is overruled.

A. The intention—I can speak for myself, in the statutory duty that I perform, there was no intention on my part to bring penalty actions against this air carrier in connection with this Catalina operation. There was no intention on the part of the Commission to do so either. The only intention that was ever expressed was that if these rates were not filed that an order of investigation would be instituted where the question of jurisdiction would be determined in the orderly course of due process of law.

We have never changed our position. That was our intent then. That is our intent now.

Mr. Phelps:

Q. And may I ask you, Judge, if you will now confirm and ratify the stipulation or the offer to stipulate which I have previously made?

A. I do so.

[fol. 369] Judge Orr: Is that all, Mr. Phelps?

Mr. Phelps: That is all I have to ask the Judge. There is one thing perhaps I would like to ask.

Q. You have heard the testimony of Mr. Treadwell, Judge, as to what occurred at the time of that conference on February 27th. Now——

A. Yes.

Q. The Court has indicated that it does not wish to hear evidence at length on that question. But it may be important and perhaps I think the Judge ought to be given an opportunity to relate what his recollection of it is, as to what took place at that conference.

Judge Orr: Yes.

A. Briefly, the conference was called—at least my understanding of the conference—was to discuss the question of this decision that had awarded reparation against United Air Lines and other air lines, as to what was to be done about it. There was a change of counsel and Mr. Treadwell and Mr. Laughlin came up to see me about it. That was the principal thing discussed at that conference.

There was also discussed the question of the penalty actions that were then pending. The testimony that Mr. Treadwell gave as to a statement, that I said we would bring penalty actions concerning this Catalina run, I have absolutely no recollection of making any such statement, none whatsoever. As a matter of fact, I do not [fol. 370] recall a discussion of that particular matter.

Q. Would you say now, Judge, that you did not say that the Commission would commence penalty actions in regard to this Catalina operation if the company did not file its tariffs?

A. I have no recollection of discussing that particular thing. I wouldn't say that it was not discussed. But I have no recollection of discussing it. I can only answer your question by saying I do not believe I made any such statement.

Q. Do you think that you would have remember- saying that the Commission would commence penalty actions forthwith unless——

Judge Orr: Of course that is argumentative.
Mr. Phelps: You may cross-examine.

Cross-examination.

Mr. Treadwell:

Q. Judge, you have seen these letters that passed between your commission, through its secretary and otherwise to the air lines in regard to this route?
A. Have I seen them?
Q. Yes.
A. Yes, sir.

Judge Orr: Before you start your cross-examination, maybe we better take our recess now and come back this [fol. 371] afternoon.
Two o'clock. We will be in recess until 2 p. m.

(Thereupon an adjournment was taken to the hour of 2 o'clock p. m. this date.)

[fol. 372] Afternoon Session, Friday, November 21, 1952 at 2 O'clock P. M.

Everett C. McKeage was recalled as a witness on behalf of the defendants, resumed the stand, previously sworn.

Cross-examination resumed.

Mr. Treadwell:

Q. Judge McKeage, you were familiar with that series of correspondence that passed between the California Public Utilities Commission and the air lines in regard to the Santa Catalina route?
A. I am.
Q. And in those letters the Commission took the position that it had jurisdiction over the lines?
A. That's right.
Q. And was that the result of your advice?
A. That was the result of my advice.

Q. And if there was a Commission hearing, if the Commission held another hearing, you would give the same advice?

A. I would give the same advice. Well, of course, depending upon the special facts that came out in the hearing.

Q. If things were just the same as they were when you —when those letters were written, you would give the same advice?

A. If there were no different factual situation, it would be my opinion, as it is now, that the State of California [fol. 373] has jurisdiction, yes.

Q. You haven't brought any proceeding or investigation?

A. You mean in connection with this Catalina route?

Q. In connection with this.

A. No, we have not. As a matter of fact, Mr. Treadwell, some time in our later conversations I know that we did discuss that, and I know that I told you that we wouldn't press you on the matter because we were concerned about those reparation matters that we were trying to arrange a program on to get those reparations paid.

Q. You mean that at some time you told me that you would not press on the penalties?

A. Well, I told you we wouldn't press you on anything in connection with the—even in investigation or penalty. We wanted to get the reparations matter fixed up first. That is what we were primarily interested in.

Q. And you have never brought any proceedings?

A. No, we have not.

Q. You are still carrying on litigation against the air lines in relation to the question whether they are liable for penalties?

A. In those other proceedings, yes.

Q. In the other proceedings?

A. Yes.

Q. They are still carrying those on?

[fol. 374] A. That's right.

Q. Now we have had a little disagreement apparently as to what took place at that conference in February. What do you say took place there?

A. The entire conference?

Q. In regard to the Catalina matter.

A. As I testified this morning, I have no recollection of even discussing that at that conference, and, as I stated, the paramount thing was the question of the payment of the reparations p-rsuant to that final decision rendered by the Commission, and I know that you also brought up the matter of the pending penalty actions that grew out of that particular proceeding. I have no recollection of the Catalina matter being discussed.

Mr. Treadwell: That is all.

Mr. Osment: No questions, Your Honor.

Mr. Phelps: I have nothing further.

Judge Orr: That is all.

(Witness excused.)

Judge Orr: Any further evidence?

Mr. Phelps: I have nothing further, Your Honor.

Mr. Ozment: No.

Mr. Treadwell: We have no further evidence.

Judge Orr: Do you want to argue, gentlemen?

Mr. Treadwell: I would like to argue the matter.

[fol. 375] Judge Orr: We would like to have you confine yourselves to the fact of whether or not the purported investigation of the Commission which might or might not require your appearance and defend, there is sufficient grounds for the intervention of equity, and issuance of a restraining order.

Mr. Treadwell: We don't consent to that, Your Honor.

Judge Orr: What's that?

Mr. Treadwell: We don't consent to that, Your Honor.

Judge Orr: All right. If you will confine yourself to that phase of it.

Mr. Treadwell: We want to argue the questions that we believe are material in the case. We don't want to be limited——

Judge Orr: I am sorry, Mr. Treadwell, I didn't get what you said there.

Mr. Treadwell: We have certain ideas as to what are material to this case.

Judge Orr: Oh, yes.

Mr. Treadwell: And those we want to present. We want to do it briefly, because Your Honor's have already allowed part of the argument that far along, but we don't want to consent that that is the controlling question in the case. Therefore we don't consent to being limited in our argument.

Judge Orr: We have indicated to you what we think of it. Now if you want to take the lead and see if you can [fol. 376] change our mind, why, go ahead.

Mr. Treadwell: Why, that has frequently been done, Your Honor.

ARGUMENT BY MR. TREADWELL FOR PLAINTIFF

There is a broad question in this case, Your Honors, You have two governments, the United States Government and the State government. You have two bodies, one the State Utilities Commission and the other the United States Civil Aeronautics Board. And it does not make any difference what conversations took place and what was done, your Honors can have no doubt nor can I have any doubt, nor can counsels for the defendants have any doubt, that those two bodies are diametrically opposed to the meaning and effect of the Act known as the Civil Aeronautics Act.

One of them says that that Act expressly by language that is plain, clear, gives jurisdiction over that route to the Civil Aeronautics Board. The other, just as much in apparent good faith says that that Act does not give jurisdiction to the Civil Aeronautics Board but that jurisdiction is in the Public Utilities Commission.

Now that is what this Court was put here for, to determine controversies between parties and between governments and between states and between executive and administrative bodies of those states, and even of the nation.

There isn't any question of any change of heart on that subject. If you have a hundred hearings you can't change [fol. 377] Judge McKeage.

I have the greatest regard for Judge McKeage. I have generally great regard for any judicial officer. But I have a personal one for him, that is deep and covers many years, and I don't know any man whose opinion I would rather accept than Judge McKeage's opinion. But you know and

I know that this question is a question, not an abstract question, but a question that has to be decided. You can't have two people regulating and governing the same proposition. You can't have two bodies establishing rates for the same utility. It is just an absurdity. It would prevent either of them from being effective, and that is brought before Your Honors.

Now sometimes there is the difficulty as to what is necessary to be shown in an action for injunction. We have that every day. We think that there is plenty here, but we will pass that. But when it comes to the fact that both the Congress of the United States and the Legislature of California have provided for the determination of controversies that arise, why, you have an entirely different subject.

You have here a controversy between these parties. A controversy is nothing, Your Honors, but a claim on one side to one thing and a claim on the other side to another thing. If I claim that I have a certain right, a riparian right to land or water, and the other man comes in and [fol. 378] says I haven't got any such right, that it doesn't exist, that I don't own the land, there is your controversy. You don't have to have anybody use an axe or a shotgun or anything of that kind, although that might come in in some way or other for some purpose so as to make it clear that you had denied the right.

But if the thing is denied and the parties are on opposite sides of that controversy, there is your controversy.

Now why shouldn't this be decided? It has got to be decided somewhere. Here we come into court, and what do we have? Why, we have the statutes of Congress saying that this Court has got jurisdiction to give us the relief that we ask, that it has got jurisdiction because there is involved a statute under which we claim one thing and somebody else claims another thing under the same statute. There is a conflict. There is a dispute.

And, of course, Your Honors know what would be the result if this company is faced with two alternatives, as to whether it will obey an order of one of these bodies or the other.

In this very opinion, Your Honors, which counsel read, written by the Commission, I suppose—probably written

—I don't know, but written maybe by Judge McKeage himself—undoubtedly when a formal decision of the Commission is rendered it is pretty well safe to say that he [fol. 379] had a finger in the pie, naturally when they go out on a limb like that. What do they say in that opinion? Why, they said in that opinion that the Chairman of the Board of the Civil Aeronautics Board had insisted that a certain rate be put in force, and he insisted to that to the United Air Lines. They said that the United Air Lines considered that a demand that they put them in force, and so they put the rates in force.

And for doing that, that which it was forced to do, the Commission puts a penalty on them in the nature of a recovery of the whole fare that was paid or the difference between the fare that was paid and which should have been paid during that period.

Now I say we come in and we ask the Court to tell us who is our superior, who shall we obey, who shall we disregard. Now we can't answer that. The attorneys for the Commission can't answer it. All they can do and all I can do, is give my best judgment on what the law is. But the Court can decide it. The Court is here to decide it.

And it needs decision. There can't be any question, it needs decision. Even if they should get out of this case in some way or tie this case up further, and, of course, this case has been in this Court for a year or more, something like that, and we have done everything that was [fol. 380] thinkable to try to help the Court to find out what the law applicable to it is, and now it is suggested that the Court don't exercise its jurisdiction. Well, Congress never intended to give courts jurisdiction and then say they didn't need to exercise it. They have just got as much duty to exercise a jurisdiction that they have as they have to refuse to exercise a jurisdiction that they haven't got.

But here the thing that is to be decided, what we are talking about, what we are interested in, is who is the body that should establish these rates and make them enforceable and binding upon the parties. And who but the Court can do that?

And the Commission comes in here in this case and says, "Well, we drew an answer, and we come in now and say we don't intend to do anything with regard to penalties."

Well, Your Honors, I am not adverse to Your Honors' effort to do something maybe a little unusual or anything of that kind. I believe that judicial cases have a certain technique and at times you have to do certain things that it is reasonable to do to accomplish a reasonable result. Now what would be more reasonable than this Court, this Court that has been indoctrinated by the parties on a motion to dismiss, long arguments, long briefs, and we think without referring to our own that they are able, that they [fol. 381] give practically, as far as I know, everything that is available, and Your Honors have heard all that, and now they come in here and say, "Well, if we say we won't do a certain thing, why, Your Honors, you ought to throw them out, get them out of court." Of course that wouldn't bind anybody else at all. There still would be no decision as to the question that is bothering everybody.

And it doesn't make a bit of difference to us. I don't know that one of these bodies is any better than the other, or any worse, or anything else. They are all presumably honorable people who are trying to do their duty, and as far as I know they both are.

But without a knowledge as to whom we are to look to, why, the whole industry is stymied.

And what do they say? They say they won't impose penalties until they brought a proceeding—which would be entirely in their hands—and until that proceeding was decided they wouldn't impose any penalties that accrued prior to the final, effective decision.

Well, if Your Honors please, when men come in and say the Legislature has passed certain laws according to our ideas that imposed these penalties, and we say that we are not going to enforce them, and the Court is asked to carry out and help in that total disregard of the law, anything except to decide and get decided the issue that is here praying and crying for a solution. We didn't come [fol. 382] into this court just because we like to be heard and like to litigate; any idea of that kind would be absurd.

We come in here because we don't know which way to turn in regard to this route. One body comes and says: Put this rate in force, it is an honest rate, it is a good rate, it is a fair rate, it is lower, they said, than any other rate in the United States, and it is all right, you put it in force. We put it in force, and what is our liability under the law? —$730,000 a year in penalties. That is what it is, $730,000 per year, which is no mean sum. And for Your Honors to tell us, tell these people that are trying to run this air line, trying to be law-abiding in every way, they have done nothing that is wrong in any way, shape or manner, except that they might make a mistake—anybody can make a mistake—but they come here and the Court says, "Well, they say now that they are not going to prosecute these penalties."

I say, Your Honor, that that just wipes out, absolutely wipes out the statute that gives you the right to come into court to have a controversy, a difference settled, by judicial decision, and we are entitled to that.

This Court is given jurisdiction, and there has been no ground that I know of to the contrary. Suppose they said they were going to impose penalties. Then Your Honors would say, well, all right, we will go on and decide it. But that isn't the only basis of what they say. They [fol. 383] have said to us that we have a right to regulate this route and fix the fares. If they have, it doesn't make any difference what they say; they haven't the right to impose penalties if any have been imposed on this type of company, because we say there has never been any imposed on this type of company. But they say it has.

I submit, Your Honors, while you have heard this case, we have dug up the evidence, we have brought the highest type of men in our organization before Your Honors, we have brought Your Honors all the evidence that could be thought of in the case, and it is ready for decision, and we are asking Your Honors to decide it and to decide it on its merits, because the Congress which gave us the right to ask for declaratory relief says that is Your Honors' duty. The statute of Congress that said that this Court had jurisdiction where claims were made under an act to regulate commerce, it intended that that jurisdiction would be exer-

cised, and we submit, Your Honors, it should be exercised and this matter disposed of.

Judge Goodman: Mr. Treadwell, don't you think there is some difference between claiming a right and asserting it?

Mr. Treadwell: There is a difference.

Judge Goodman: That the State of California might say that they claim the right to regulate, but if they never [fol. 384] have taken any steps to assert that right, has any controversy arisen?

Mr. Treadwell: I don't believe whittling down a beneficial statute, such as the statute with regard to the right to have declaratory relief, by a lot of language——

Judge Goodman: Suppose the Public Utilities Commission never does take any further steps in this matter in respect to——

Mr. Treadwell: I am taking the case as it is, and there is no use of my arguing something that isn't here. The thing is here that they have gone to work and had their high officials write to us telling us that they have this right and that they are asserting it. If Your Honor would read those letters——

Judge Goodman: I have read that letter. But here in court, though, they said they were not now asserting that right.

Mr. Treadwell: Well, they don't say they don't assert it, Your Honor. They say they won't assert it until they have a hearing. That's the farthest that they go.

But what difference does that make, if we have an action, a cause of action because there is a difference between us? That's a controversy. Your Honors can look up the laws as well as I can on the question of controversy and it is just the broadest proposition that there is, and the courts [fol. 385] have always given it the very broadest kind of an interpretation, and I say that it does not mean that you have to go out and forcibly get into a fight or anything of that kind. No, nothing of that kind.

The difference between a claim and an assertion—I can't see anything——

Judge Goodman: The difference is when you seek equity, you seek to enjoin in advance, to show some other basis for asking that relief, such as irreparable damage.

Mr. Treadwell: You don't need that.

Judge Goodman: There is no question about the right to have a controversy determined. But the only question is it shouldn't be determined in advance at this time. That is all.

Mr. Treadwell: It is always in advance.

Judge Goodman: Provided that you are able to show there is a damage of some irreparable nature that requires the Court to act in advance rather than to wait to resolve it at the time of the controversy.

Mr. Treadwell: You mean to tell me that if two people live along side by side and one of them claims that he owns something and the other one claims that he doesn't, that you have got to wait around and see if they don't get into a fight and make a greater commotion or something? Of course, it's in advance.

[fol. 386] Judge Orr: Does your statement correctly present the picture? You say that two neighbors, one claiming one thing, another another. Then you resolve that dispute. But if you say, "I own some land—" taking your example—"I own some land. Joe Doaks says, 'well, I don't know whether I have any interest in that or not.'"

Mr. Treadwell: That isn't this case.

Judge Orr: John Doe says, I am going to investigate and see.

Mr. Treadwell: That isn't this case. That isn't this case. We have their direct statement that they have this right.

Judge Orr: Not before this Court.

Mr. Treadwell: Why not? In all those letters they said that they had the right.

Judge Orr: Concerning the right, why, that is a different thing. As I get this picture, this way, that you say they are a commission. They are asserting a right. They say, no, we are not asserting, right now, that we have got to wait and see, if we have a right here, and if we find out after investigation that we have, why, we will assert it. So you say, we have got a controversy here, that these people may in the future assert this right, that you are going

to head them off, and find out from this Court now and have this Court tell you whether they have a right or not before [fol. 387] they assert it. That's the picture as we get it,—as I get it rather.

If the evidence is such that—disregarding the attitude which they now take—if it was such that they say, we have a right and are asserting it. Then there is cause for intervention. But the mere expectancy that somebody may assert a right is what bothers me.

Mr. Treadwell: I am not claiming anything of that kind.

Judge Orr: I know you are not claiming it. But isn't that the case? That is what we are confronted with. Isn't that the case before us?

Mr. Treadwell: No, Your Honor. The case before you is that the Commission, speaking to us, has told us in no doubtful terms that they have this right and that it is our duty to obey what they say in regard to these rates.

Now, it isn't just something that we have worked up. It comes from them. I don't care whether you call that an assertion or a claim or what you call it. It is a claim that they make and it is an assertion that they make, and you don't have to distinguish them because it is both. You asked me what the distinction between an assertion and a claim is. Well, I don't know whether there is any.

Judge Orr: I am asking you by what is this Court to be guided, the former position which they have asserted in a letter, or a position taken at this time of trial?

[fol. 388] Mr. Treadwell: They have taken it right here. Judge McKeage, the last thing he said on the stand, he claims that they have that right, that he has advised them as a lawyer that they have the right, and that if they call another convention or meeting or conference to find out, that he will advise them again that they have that right.

Judge Orr: When they hold their meeting and if he so advises it, they will then assert that right.

Mr. Treadwell: Well, they have asserted it.

Judge Orr: And not until that time will the right be asserted.

Mr. Treadwell: Of course, Your Honor asked me to give my views on that and I stated it is asserted and claimed.

Judge Orr: I am very glad to get your views. I want to see if you can straighten me out.

Mr. Treadwell: That is what I am trying to do. I am not trying to be smart or outsmart Your Honor or anything of the kind.

Judge Orr: When I say I want you to straighten me out, maybe you think that's a pretty hard task. I would like to have you try.

Mr. Treadwell: Our idea of the case is a very simple one, Your Honor. I don't say that my case is just something different from anybody elses. But I say that generally when there is disputes between the parties spoken, announced in [fol. 389] the most formal manner, incorporated in opinions which are published by the State, printed, and they come out and they make these contentions, I say that that is quite sufficient to make a controversy where you dispute everything that they say.

Judge Goodman: It may be, Mr. Treadwell, that none of us have made ourselves quite clear. We have already ruled that you stated a cause of action.

Mr. Treadwell: I think Your Honors have.

Judge Goodman: Now the only question is, is this the time to grant the equitable relief that you ask for? Now, that is all.

Mr. Treadwell: Suppose it wasn't. We are asking relief —the relief that we are asking, that you call equitable relief, is to determine whether we have this right or whether we don't have it, and whether they have the right they claim or whether they don't have it. Now if you decide that, I don't care whether you give me an injunction or not. I think I am entitled to it. But Your Honors have a simple question of deciding this issue and this controversy.

Judge Goodman: Well, the only way we can decide it, that is, either to grant an injunction or give declaratory relief——

Mr. Treadwell: Sure.

[fol. 390] Judge Goodman: —of some kind, which would be equivalent to the prevention of any further act on the part of the defendant in the future.

Mr. Treadwell: Quiet title suit is the most common instance of declaratory relief. You simply declare that one

man owns it and the other man does not own it. That's all there is to it.

Judge Orr: I think we can get to the other proposition. Now, if we were firmly convinced, as you are, that the controversy now exists, then in that situation that would clarify itself. But you rely upon the letters asserting a certain position.

Mr. Treadwell: That's right.

Judge Orr: On the other hand, suppose that isn't an established fact, the question of whether they assert that position is yet to be determined by the Commission.

Mr. Treadwell: They didn't say so in those letters.

Judge Orr: Oh, no?

Mr. Treadwell: They said they did assert them.

Judge Orr: Now, which position are we to take, they come here and say they have not made a determination, this Commission has not made a determination as to whether they will assert those rights and until they do then the controversy does not exist, does it?

Mr. Treadwell: I think that it exists as soon as a body [fol. 391] of that kind makes a declaration of what its position is.

Judge Orr: I suppose that you are saying that if at the time you got those letters you were in a position to say that they had taken this other position, that they were going to assert those rights, by reason of those letters, then, you very properly would come into this Court and ask for a determination of whether they had the right to do that.

Mr. Treadwell: Yes.

Judge Orr: What is bothering me a little bit now is what effect should this Court give to this change of position, if it is a change of position? Mr. Phelps does not think it is. But it seems to me that there is a change of position to that extent, that in the letters they say: we have these rights. Now they say: we haven't determined as a matter of Commission action. We are going to investigate to see whether we do or do not have these rights.

Judge Goodman: They might even take the position relying upon Judge McKeage's opinion, that they believe that they have the right to assert jurisdiction, but deter-

mine not to assert jurisdiction over you for other reasons. And may be some other reasons that might urge them to say that even though they feel they are in a position to assert jurisdiction over your air line, that they are not going to do it now. If they didn't do it, you wouldn't have any cause of action against them.

[fol. 392] Mr. Treadwell: We have a cause of action on account of the threat which clouds the whole issue.

Judge Goodman: Unless it causes you some damage, it is no more than a threat of a man who says he would like to do away with the judge. If he doesn't do anything about it—except that you might put him under bond and keep the peace or something like that—it still isn't an actionable cause of action.

Mr. Treadwell: I can't answer that, Your Honor.

Judge Orr: You never expressed an opinion of that kind?

Mr. Treadwell: I have never expressed such an opinion.

Judge Orr: I won't say whether you had it or not.

Mr. Treadwell: Of course, Your Honor, I don't think there is any room for——

Jude Orr: I think we have our position pretty well, Mr. Treadwell. We will have to work it our for ourselves.

ARGUMENT BY MR. OZMENT FOR INTERVENOR

Mr. Ozment: I have already covered the question of our position with reference to the mere institution of the proceedings before the Commission being sufficient to warrant intervention of the Court at this time. I would like to elaborate.

Judge Orr: We would like to have you tell us a little more about those cases you have.

Mr. Ozment: Yes, Your Honor. The first case is the [fol. 393] Bryce against Santa Fe Elevator Company. It was a warehouse case. The Commission of Illinois had some sort of jurisdiction to regulate warehouses. I am not just sure how far their jurisdiction extended. The court ultimately decided as to some of the matters complained against the State, the Commission had jurisdiction and as to others it did not have. But the complaint was filed by a competitor, as I recall, against the Santa Fe Elevator

Company, and the company thereupon moved to dismiss the complaint for lack of jurisdiction. The Commission denied the motion to dismiss and said the case stands for hearing.

Now it does not appear from the Supreme Court opinion whether in doing that that the Commission asserted jurisdiction and said, we will go ahead and act in this matter, or whether it was the traditional simple denial with the whole question of jurisdiction open at the hearing before the Commission. I suspect it was the latter.

Judge Goodman: What was the posture of the case? That is the important matter. Was this appealed to the Supreme Court from a decision refusing to dismiss the complaint?

Mr. Ozment: No. After the Illinois Commission refused to dismiss the complaint—in other words, assuming the California Commission had refused to dismiss the complaint, the party against whom the complaint was directed before the Commission immediately moved into the Federal Courts for we'll say, seeking declaratory and in- [fol. 394] junctive relief, just as these plaintiffs have done. The only difference between the two cases is that here we have a letter order, so to speak. We have a letter demand. There we had a formal order entered by the Commission. The Federal Court took jurisdiction, decided the issues, and then an appeal went to the Supreme Court, and the Supreme Court passed on the validity of the District Court's determination.

Judge Goodman: There was a formal decision of the Commission there which gave its asserted jurisdiction?

Mr. Ozment: I am not sure, Your Honor, whether there was anything more than a bare order denying the motion to dismiss.

Now, as Your Honors know, the habitual order, regulatory order, in these Commissions is not to determine your jurisdiction. You say: We just deny the motion to dismiss at this time; we will determine the jurisdiction at the time we hear the merits. That is the customary procedure, and I assume that is what the Illinois Commission did.

But, in any event, the Federal Courts stopped the Illinois Commission in its tracks, to use the bureaucratic language,

they stopped them. They said: You shall proceed no further.

Judge Goodman: It was a proceeding before the Commission?

Mr. Ozment: There was a formal proceeding, yes, Your [fol. 395] Honor. There was a formal proceeding.

In the Bethlehem case there had been a subpoena issued, subpoena duces tecum and the Federal courts intervened on a state order affirming or directing compliance with the subpoena.

In the United case, which is the closest case factually I think to this particular case, there the Commission had entered two orders, as I recall, one more or less asserting jurisdiction, the other directing the company to appear and defend before the State commission, and it ultimately thereupon went into the Federal court. They alleged, as in this case is alleged, irreparable injury, and the Public Utility Commission of Ohio, even as this Commission, flatly denied all of the allegations. They said in substance there had been no untoward circumstance which will result to you if you fail to abide by our order. And the Supreme Court commented on that. They pointed out that the Commission had denied all of these allegations of irreparable injury and threats and enforcement and the like, but they went on to say that the parties had stipulated that it would cost the plaintiffs a substantial sum of money, in excess of $3,000, to comply with the order to appear and defend. Now that is the case that we have here, I submit.

Mr. Treadwell testified that it will cost more than $3,000 to defend the action before the Commission. I think that [fol. 396] certainly it would cost at least $3,000. I think there is no doubt as to that. And here they deny any threats of reprisals. The case is identical, it seems to me, to this Supreme Court case.

There is a crying need for relief. The company is going to be put to expenditures.

Judge Goodman: You say specifically that the matter Mr. Treadwell referred to is equivalent to the factual situation or is comparable to the factual situation in these three cases where the Commission itself took some action?

Mr. Ozment: Yes, Your Honor.

Judge Goodman: In one case they ordered the utility to appear and produce evidence, and in another case they directed the subpoena duces tecum issue, and in the third case they made an order dismissing the complaint. Now what you are saying is that this letter is equivalent to that.

Judge Murphy: In other words, in each of these three cases, which you mentioned formal orders were issued by the Commission.

Mr. Ozment: There were formal orders, Your Honor, yes. Now if I——

Judge Murphy: That isn't the situation here.

Mr. Ozment: If I may comment briefly on that. First of all, the Court is aware an order of the regulatory agency, to be a reviewable order, does not have to be a [fol. 397] reviewable order, does not have to be a formal order with a serial number reciting on its face that it is an order. Letters can be reviewable as orders, and they are on occasion reviewed as orders. There are circuit court decisions holding that where the commission addressed a letter to the individual telling him to do what they told him, could just as well by a formal order, that he can seek review of that determination.

I direct the Courts' attention to the fact that these orders or these letters from the Commission do not purport to emanate from an official of the Commission. They purport to emanate from the Commission itself. They are signed by the Secretary. Now the only way a Commission can act is, of course, through its secretary. Our orders are attested by our secretary. That is just the equivalent in this case.

There was one point that I would like to mention briefly. I thought I detected from what the Court or some of the Judges were saying that there might be a possibility that United in this case would not actually be put to any expenses because they did not have to appear and defend.

In other words, that the United can sit by and say to the PUC of California: Go ahead and hold your proceedings and we aren't going to show up; that whenever you come out of that, why, with whatever you arrive at, then [fol. 398] we will appear and defend.

I submit that United cannot safely follow any such course of action. It is one thing to come in and say: We don't have to go through a proceeding before the agency. It is another thing when the Court says, if the Court should dismiss, you must seek a determination first from the PUC. It is quite a different thing for United not then to appear and defend, and I very strongly suspect that under those circumstances that the Public Utilities Commission could invoke and successfully invoke against United the rule that they simply had not appeared and defended, that it was more or less a default sort of proposition, and I just think that United cannot do anything but appear before the State Commission. I know that is the position which we would take in our litigation. If somebody fails to appear before us, our statute says that you shall not urge objection before a court which is not urged before the agency. That is a firm command to appear and defend. If you don't, you are out of luck.

Judge Goodman: Wouldn't it be time enough for this Court to intervene when such proceedings start?

Mr. Ozment: That raises the question of distinction between a formal order of investigation and simply an announced contention of instituting such investigation.

Judge Orr: I find something here that I didn't get be- [fol. 399] fore. It may have some significance.

> "This is to inform you that the Commission does have jurisdiction over the service in question, being intrastate, and the Supreme Court of this State has held that such service is subject to the jurisdiction of this Commission. Therefore you are instructed to file with this Commission the tariffs covering the service in question."

Now, that may be construed as an order.

Mr. Ozment: That is my point, that an order does not have to necessarily be one with a serial number and with all of the—with the seal on it. That a letter directive is an order. And here is an order.

Now there are two possibilities, two ways, which this matter can be reviewed. One, that this is already such an order to be followed—at least an order directive to file.

The other, that the Commission has yet not instituted or entered such an order. But we cite a case in our memorandum, Supreme Court case, which takes cognizance of the fact that there was an opinion that the Commission in that case had not yet entered a formal order and the Supreme Court says that it makes no difference, they certainly intended to do it and that is enough, you don't have to wait until they actually issue a piece of paper, you can go on it and get your relief.

Now it seems to us that under these circumstances that [fol. 400] the Court has jurisdiction and it is under a duty to decide the case at this time.

Now what I have been saying so far has related to the United's case. Now I would like to talk very briefly about the Board's case. The Board is a full party to this case, as we understand it. We are a plaintiff. We have filed a complaint and that complaint has been answered. The Board has standing, even as any other litigant, to seek a determination of the merits of this case. We have cited the cases in our memorandum previously filed with the Court to that effect.

The Board alleges that, among other things, the PUC had asserted jurisdiction and that it intended to exercise that jurisdiction in the form at least of a proceeding before it.

The answer which the PUC filed said: Yes, we assert jurisdiction, and yes, in substance, we are going to institute a proceeding before ourselves.

Now it seems to me that irrespective of whether United established their case or not, we have established our case, and as a matter of law we think we are entitled to a determination.

Judge Orr asked the question: What is the posture of the case, what are the defendants arguing today? Well, the defendants are asserting today, through their answer to our complaint, right as of this moment they claim jurisdiction and they are going to exercise jurisdiction. [fol. 401] Judge McKeage didn't say anything very different in my way of thinking. He said, yes, I told them before they have jurisdiction and I will tell them again

they have jurisdiction, if there is no change in circumstances.

Now I can't conceive of any possible change in the circumstances. The only possibility is that perhaps there will be some legislation which might be passed affecting this title and situation. It is inconceivable to me that they would ever pass legislation extending the California jurisdiction clear out across San Pedro Channel. But that is the only possibility that I can see that would make any change at all in the circumstances, and that is just so remote and so speculative that I just don't think that it is a fact to be considered.

We stand before the Court with pleadings and with testimony which we think entitles us to some form of relief and we are not concerned as to whether that takes the form of declaratory order or whether it takes the form of injunctive relief.

Now one last word and I will be through, and that has to do with this question of whether the Commission may follow through with what they previously announced that they intend to do. I think that that is a possibility which is always present in any law suit. You just simply could not get an injunction if you said, well, we will not issue an [fol. 402] injunction or we will not give declaratory relief because the parties may change their mind. Sure, they may change their mind. They habitually do. Cases are settled right up to the time of argument. But that does not make it any the less a valid case for decision in the absence of a change of mind.

And, of course, we have here a Commission which is under a duty to exercise its jurisdiction. We presume that they will exercise that jurisdiction, which they assume that they have. They will be remiss in their duty if they didn't and certainly nothing was said today that would indicate that they didn't intend to go right ahead with this action.

And that, and that alone, we maintain, is enough to warrant and require the Court to take jurisdiction.

Mr. Phelps: May it please the Court, may I inquire how much time I have?

Judge Orr: How much time?

Mr. Phelps: Yes.

Judge Orr: We haven't been observing that. If you go too long we might suggest to you that you have about five minutes to finish. You can go on to that point.

ARGUMENT BY MR. PHELPS FOR DEFENDANTS

Mr. Phelps: First I should like to comment, if I may, upon the question as to whether or not there is any threat or any reality to any threat of any irreparable injury to these parties in the event this Court should decline the [fol. 403] relief requested. Out of deference to the Court's suggestion I did not introduce here all of the evidence which I had originally planned to introduce here this morning on the question of just what has occurred between the parties here on the question of the utterance or expression of threats as to the Commission's intentions.

I am going to assume then for the present, if Your Honors please, that the Court will find and believe that the Commission now has and I trust will find also that the Commission never had any intention with respect to this Catalina operation other than as expressed by Judge McKeage, to institute an investigation, allow whatever order comes out of that to become a final order, and await the determination of that, and determine if it should be adverse to this plaintiff.

Judge Orr: How do you reconcile—you say "never has". How do you reconcile that language in this letter?

Mr. Phelps: My view of the letter, Your Honor, is this, it is an expression of the opinion of the Commission, if you will, conveyed through its secretary, that it had jurisdiction in the circumstances.

Judge Orr: And ordering affirmative action on the part of the defendant. Not only an expression that it has jurisdiction but an exercise of jurisdiction. It did intend an exercise of jurisdiction by ordering the air lines to file [fol. 404] the rates.

Mr. Phelps: It is true, Your Honor, the concluding——

Judge Murphy: The concluding sentence——

Mr. Phelps: The concluding sentence of the last letter is:

"You are instructed to file the tariffs."

That is true. That follows from its expression of opinion that it has jurisdiction, it being the Commission's position that if we have jurisdiction, as we say we do, it follows from that that you must file your tariffs. But it does not follow from that expression of opinion that the Commission thereupon is going to commence penalty actions against these people if they do not file that tariff. On the contrary, the intention has always been and is wholly consistent with those letters that first of all a formal investigation would be instituted and the parties heard fully and that that order would have to become final before any penalties would be instituted.

Judge Murphy: Well, isn't the plain tenure of that letter to put them on notice that they would be expected to file with the Commission the tariffs requested?

Mr. Phelps: Yes, it is, Your Honor.

Judge Orr: And that the investigation must have been previously had and that they have reached a conclusion. They have reached the conclusion, now, they have the jur-
[fol. 405] isdiction and now they are going to exercise it?

Mr. Phelps: Your Honor, let me explain, if I may, how the Commission functions. There are formal, so-called formal proceedings before the Commission, many of which are proceedings that resemble very closely proceedings had before this Court this morning. They are set down for hearsing with notice, of course, to all the parties. The evidence is usually heard before an examiner, and ultimately the Commission arrives at a formal decision and announces that and serves it, of course, upon the parties. That becomes then the point of departure for any appeal or review which a party seeks to enjoy. It has never been the though- of this Commission that a letter, the kind referred to there, in itself was a reflection or an embodiment of the Commission's expression of its jurisdiction. That is an opinion, as I say, as to what the Commission said, although we do not say it is not the Commission's informal opinion, if you will, but it is always contemplated in our experience, in our practice, that there would be a formal hearing before the Commission's formal position, which would be subject to review, would be expressed.

Judge Orr: I don't know what the general review is. I know if I were in the position of the air lines and got a letter like that, I would commence to do something. I think I would better do something right away, either send [fol. 406] the tariffs or tell them the circumstances.

That seems to me like an order, a direct order, and what may be back of it, I think I am logical in saying that that does not convey to the party—no matter what their intention may have been, that letter does not convey that impression to the person receiving it. It means that the party receiving it, you better comply with this, you do this thing—that's it. And I received it, I would feel I better do that or take some other action to challenge their jurisdiction or do something else, because otherwise I might get into very serious trouble.

Mr. Phelps: Well, if Your Honor please, if I may say so, it does not seem to me that that letter fairly construed can be interpreted as conveying to these parties that they were in danger of being made defendants in a penalty action, penalty actions or criminal prosecutions.

Judge Murphy: There is a subsequent letter which seems to give point to the previous letter to which Judge Orr has referred, in which the last paragraph reads:

"This refers to our exchange of letters" and so forth. The first paragraph, the second paragraph, which consists of one sentence, says;

> "Can you now inform us what position you propose taking in this matter?"

In other words, you are again putting them on notice. [fol. 407] Mr. Phelps: Yes. It was again, Your Honor, it was the hope that was entertained, that the United Air Lines would have no objection to the Commission's exercise of jurisdiction over this Catalina flight, it being a short flight, it being in our view, within California. It was hoped that the United Air Lines would submit to the Commission's jurisdiction on that flight.

It was not meant to say, however, that if you do not so submit we will immediately commence penalty actions and criminal prosecutions against you. That has never been the intention, and I submit, Your Honors, those letters do

not fairly admit of that interpretation. It was an expression of opinion as to what the Commission's thought jurisdiction was, coupled with the—to file tariffs, which follow an expression of opinion coupled with the hope that the company would comply, but contemplating all the while there would be formal proceedings with full opportunity to be heard in argument, submission of briefs, and otherwise, before that decision becoming final, with all review exhausted before any penalty suits would be instituted.

Judge Orr: How do you usually operate? The Commission, how does it usually operate?

Mr. Phelps: The example we have had before us this morning, rather one that has been referred, the decision has already been rendered, is a good example of how the [fol. 408] Commission functions. There the first step was the institution of an investigation on the Commission's own motion. United Air Lines was one of several respondents there. The case was fully heard, fully tried, fully heard and argued, review was completely exhausted, and then the Commission implemented or sought to implement its order to the parties to make reparation and also then, but not until then, filed its penalty action.

That is the way the Commission functions.

Judge Murphy: Well, I can't reconcile your argument, the argument that you are making now, with your letter of December the 27th, 1951, the last paragraph of which says:

> "In view of our interpretation of the Civil Aeronautics Act and the California Constitution, we again instruct your client, United Air Lines, Inc., to file with this Commission the tariffs covering the service between Avalon and Long Beach, Los Angeles."

Now if that isn't a definite order, I don't know what is.

"We again instruct your client"——

Judge Orr: That is the second time?

Judge Murphy: That is the second time.

Mr. Phelps: Yes. Well, as I say, it was couched in terms of an order, to be sure, but in terms of an order that the Commission felt followed naturally from its expression

[fol. 409] of its opinion as to its jurisdiction. But it does not seem to follow that there is an implied threat there that if you don't do it you will be subject to penalty actions.

Judge Murphy: Any reasonable man reading a letter of that kind would certainly interpret it.

Do you stand now in court on that instruction in that letter or do you withdraw that now in court and say: we withdraw the instruction and order that we issued you to file schedules?

Mr. Phelps: Well, I have no——

Judge Goodman: I suppose you have no authority to answer that, but nevertheless that is a very pertinent question. Isn't it?

Mr. Phelps: Well, Your Honor, it seems to me that the stipulation or the offer to stipulate and the statement of position and intention which Judge McKeage has expressed has the same effect.

Judge Goodman: Well, would you add to that stipulation, the stipulation that the Commission withdraws and does no longer instruct the air lines to file these schedules?

Mr. Phelps: Well, if I may confer with the Judge for a moment, I think perhaps we can answer your Honor more directly on that.

Judge Goodman: If you do that, then that would be a definite statement here in open court that you are not [fol. 410] asserting jurisdiction, at least to the extent of requiring schedules to be filed.

Mr. Oxment: If Your Honors please, if I may make a statement on that point. I don't know what Judge McKeage's authority may be. I know that one member of the administrative agency cannot bind the agency, and certainly a lesser official of the agency cannot bind the agency.

I think that this order, letter, whatever you call it, is in the record, and it would take formal action on the part of the commission to make it appear to be—or to withdraw from that letter, and I must object at this point to counsel indicating, "well, we didn't mean what we said." I think that they did mean what they said, and I question counsel's rights to withdraw Commission action.

Judge Goodman: Wouldn't they have the same right to make the stipulation in that regard as wherein they had signed a stipulation of facts? The attorney is representing the Commission.

Mr. Ozment: No, Your Honor, the things are entirely different. They are entirely different. One purports to be formal action by the agency. The other is simply authority to represent their client in a lawsuit. And I had assumed moreover that in connection with that stipulation, that that stipulation would have more teeth in it than just counsel's say-so. I would assume that the moment that they took any contrary action that there would then be [fol. 411] contempt proceedings before this Court, and that there would be action in a hurry if at that time some untoward action should be taken,—at least it would be another injunction issue. I would assume that would be so. Certainly we couldn't be stipulated out of Court without some remedy in the event that the stipulation was not thorough.

Mr. Phelps: I would like to try to make clear, if I can, the fact that under the Commission's practice as guided by the California Public Utilities Act a mere letter of the Commission, such as we have here, cannot be made or cannot be turned into a foundation for contempt or penalty actions or anything of this sort. The law requires that before a utility or a party be made the subject of Commission action that he have a hearing. Now there was no hearing here. There is no one, and no one has pretended that there was a hearing before the Commission as such in this matter, and the letters there never became or never intended to be of such a nature as to give or serve as a basis for implementation in the form of contempt or otherwise.

Judge Murphy: That is not very convincing, is it, counsel? When this case started in this Court it was on the theory that there had been a definite assertion of jurisdiction by the Commission and what caused the Court to pause in this matter was some statements were made that would indicate that the Commission had no present inten- [fol. 412] tion of pursuing the matter and that therefore there wasn't anything that required any immediate equi-

table action by this Court. Now, if you are really going to assert this jurisdiction and you are doing so and there is quibbling in connection with the terms of it, there it seems to me that I for one am willing to assume the position that there is something for the Court to determine here in this case.

This all came about because of some inquiries the Court directed, and the defendants' answer apparently indicated that they weren't going to do anything, that they hadn't asserted jurisdiction and for the time being they weren't going to.

Mr. Phelps: Let's be sure, Your Honor, that we understand one another as to what is intended to be conveyed by the word "assert" jurisdiction. The expression of an opinion, I think we can say, is not yet an assertion of jurisdiction. If that expression of an opinion is coupled with a direction to file a tariff, again you can say it is an assertion of jurisdiction in the sense that it directs the party to comply with the Commission's version of what it thinks its jurisdiction is.

But if you say that asserting jurisdiction means doing something that will harm the plaintiff, such as bringing penalty actions, or criminal prosecutions, then I say that [fol. 413] in that sense of the word "assert" the Commission has never asserted such jurisdiction.

Judge Orr: And not intended to. That is not what we are confronted with here, it seems to me. I think that it is reasonably said that the air line company has a right to assume from those letters that were read that this Commission had ordered them to file tariffs and certainly they couldn't order them to do that unless they were asserting jurisdiction and thought they had jurisdiction. They couldn't safely stand by after that order was made and wait for any subsequent action of the Commission.

Mr. Phelps: I think they could.

Judge Orr: Because the Commission, if it brought an action for penalties, would have to base it upon a disobedience of this order which they had informally made. So if they stood by after that order there contained in this letter,

they would be running the risk of the penalties for wilful disregard of an order of that Commission.

Mr. Phelps: Now with that, Your Honor, I cannot agree.

Judge Orr: Perhaps not. But looking at the plain wording of those letters, I cannot get any other conclusion from them.

Mr. Phelps: I say, Your Honor, I respectfully must disagree, because——

Judge Orr: Well, you have that right, you know.

[fol. 414] Mr. Phelps: Yes. The letter, I think, was not calculated and not intended to convey to the plaintiffs that they were in peopardy or were in eminent risk of being subject to pecuniary harm or otherwise if they didn't comply with that instruction.

Judge Orr: I suppose that you and I can agree upon the proposition that it will be the duty of this Court to place a construction upon that language as used in that letter?

Mr. Phelps: Yes.

Judge Murphy: This last letter of December 27, 1951 is a very well-thought-out letter. It contains a very concise analysis of the position taken by the Public Utilities Commission, and then it ends up with a final paragraph:

> "In view of our interpretation of the Civil Aeronautics Act and the California Constitution, we again instruct you,——"

after giving an analysis in some detail of the factual situation and the predicates upon which you based your conclusions.

If that isn't notice, I can't conceive of any more formal notice. "We again instruct you."

Mr. Phelps: I can only say, Your Honor, that that letter, I think, should be construed in the light of the Commission's practice. True, letters like that are not uncommon in the [fol. 415] Commission's practice, and it has never been the Commission's view that any such letter as that would give rise to penalty actions for contempt, because the law does not permit it. The law requires a hearing to any party concerned.

Judge Murphy: Where is there any advice to the air line company that they are entitled to a hearing?

Mr. Phelps: It is not conveyed in that letter, Your Honor, but it is in the Public Utilities Act, and I think it can be assume- that the parties would realize that they would have a right to a hearing. It seems to me that would be fundamental, that you would be entitled to be heard before you could be made the victim of a penalty action or contempt proceedings. These parties have not been heard formally or otherwise. Well, there is an exchange of correspondence, but——

Judge Orr: What would be the next step? Suppose nothing had been done by the air line company and they had disregarded the letter, what would be the next step of the Commission?

Mr. Phelps: A formal investigation.

Judge Orr: To determine what?

Mr. Phelps: To first ascertain the facts as to the operation and then to determine whether or not the Commission had jurisdiction over that operation.

[fol. 416] Judge Orr: If they had determined it had jurisdiction?

Mr. Phelps: That would be subject, of course, to review.

Judge Orr: And finally if it had been determined that they had jurisdiction——

Mr. Phelps: Yes.

Judge Orr: —by then a penalty action would have laid against these people for wilful disregard of that instruction?

Mr. Phelps: No.

Judge Orr: Why not?

Mr. Phelps: I don't think so.

Judge Orr: Why not?

Mr. Phelps: Because the Commission would not interpret that order. That letter as an order having been made without a hearing, it would not consider that, under the law, could not consider it, as something—as the kind of order made—that order made without a hearing, that could not be considered that that would be the subject of contempt or penalty actions. Any penalty actions, as I said before, would be considered only after final decision, only

after the parties had been given an opportunity to comply, if that had been the result.

Judge Orr: Why take such action as this before a hearing if they don't expect it to be obeyed?

Mr. Phelps: It was hoped that it would be obeyed, Your Honor, as I said before. It was hoped that the United Air [fol. 417] Lines and the other plaintiffs would have no objection to the Commission exercising jurisdiction. The Commission's jurisdiction over San Francisco-Los Angeles operation having been finally confirmed, it was hoped that the parties would have no objection to the Commission's jurisdiction over this flight.

Judge Murphy: So the form that this letter took then was in the hope that the necessity for a hearing might be obviated, is that correct?

Mr. Phelps: Yes, I think it was fully within the intention of that letter that if the parties complied, that would end the matter.

Judge Goodman: If they complied, then the Commission would have exercised its jurisdiction and regulated those rates.

Mr. Phelps: Yes.

Judge Orr: Of course.

Judge Goodman: Then, you are really not going to do anything in this hearing except what you have done before?

Mr. Phelps: I am not sure I understand you, Your Honor.

Judge Goodman: If that is the case, then I am wrong about my interpretation of what has been said here earlier this morning, that you are not initially going to do anything at the hearing except assert this establishment of rates of United Air Lines in the service to Catalina.

[fol. 418] Mr. Phelps: That is as far as the Commission intends to go at the present time. It is to be hoped that is as far as it will go.

Judge Murphy: Thereby you do intend to establish those rates at this hearing or at the initial course of this investigation?

Mr. Phelps: It is the intention to have the investigation.

Judge Murphy: With what purpose in mind?

Mr. Phelps: To determine whether or not the United Air Line should file a tariff with the Commission.

Judge Goodman: Is that really so or is this investigation going to be just a determination what the rates are going to be fixed? Are you going to conduct an investigation to determine whether the Commission has jurisdiction?

Mr. Phelps: Yes.

Judge Goodman: You have already told them to file their schedules.

Mr. Phelps: Indeed, yes. Yes, the jurisdictional question would have to be gone into at that time, at the time of this formal hearing.

Judge Murphy: As a practical matter, if you referred to your letter of December 27th, which I have seized upon here, there can be no other result than that you will again instruct the United Air Lines to file the tariffs covering [fol. 419] the service unless there is some radical departure from the position which you have taken in this letter.

Mr. Phelps: That is true.

Judge Murphy: There can be no other result.

Mr. Phelps: That is true, Your Honor. But then the parties would have a right to seek review of any such order, and, furthermore, there is the possibility that the Commission might be persuaded to change its mind. That is not inconceivable.

Judge Goodman: It is true the United Air Lines would have a legal remedy.

Mr. Phelps: Indeed.

Judge Goodman: But the question is whether or not they are entitled to this relief in order to avoid some irreparable injury that would culminate by having been compelled to follow that legal remedy.

Mr. Phelps: Yes.

Judge Orr: They have made an election. It seems to me that the air lines have made an election between remedies existing. They could have gone before the Commission and raised the question. They have now come into this court and said, here, we don't want to be put to that expense, and we claim they have no jurisdiction over us at all, and we ask you to so declare. Now that's the situation. Under

the circumstances perhaps had a right to make that election.

[fol. 420] Mr. Phelps: Now that brings me to the next major point I want to discuss, Your Honor. I had hoped that I had expressed myself fully to the effect that the parties here were under no risk of irreparable injury. Now I submit that that is the fact. Now the question is, should this Court in the absence of any danger of irreparable injury, should this court retain this complaint for the purpose of declaring judgment upon the parties. And that brings me to the case and a very important case, the case of Alabama Public Service Commission vs. the Southern Railway Company. I have already referred to that case on the previous occasion.

Judge Orr: Is that in the brief?

Mr. Phelps: That is in my formal brief, yes, Your Honor. That case was decided on May 21, 1951, and I believe I can say that it is the most recent expression of the United States Supreme Court on the question of what a federal court should do in a case in which it is asked to issue equitable relief which has the effect of interfering with the operation of state agencies or branches of state government.

Now in that case the Southern Railway had applied to the Public Service Commission of the State of Alabama requesting permission to discontinue certain local trains which they were operating at deficits and were a burden on interstate commerce. The Alabama Commission declined to authorize that discontinuance. The Alabama statutes had provisions for penalties applicable to rail-[fol. 421] roads and others in the event that they refused to or in the event that they abandoned the service without the permission of the Commission.

Mr. Treadwell: Would you excuse me, please. You argued all this on the motion to dismiss in this particular case, and it is also in our brief and the Court passed on it.

Mr. Phelps: I don't think——

Judge Goodman: It has been introduced.

Mr. Phelps: I wish to talk about this case in the light of the evidence that has made here.

The railroad company then filed a complaint in the Federal District Court in Alabama requesting injunctive relief against the enforcement of any penalty actions that might be exercised by the State of Alabama. The District Court granted such relief. On appeal to the United States Supreme Court the judgment of the District Court was reversed.

Now that, Your Honors, I submit, is a very far-reaching decision. It is the latest expression and I think can be called the culmination of a long series of cases involving what Justice Frankfurter has called the "doctrine of abstention." Justice Frankfurter in this Alabama case wrote an opinion, a separate opinion, concurring in the result but disagreeing with the majority as to the manner in which the result was reached, but his concurring opinion is most interesting and indicated the extent to which the majority opinion was going, and he points out that it is a very far-[fol. 422] reaching decision and presumably that is what the majority of the Court intended. I should like to read, if I may——

Judge Orr: I guess that case is rather familiar to us, having been cited before. Wasn't it? You cited it before?

Mr. Phelps: Yes.

Mr. Treadwell: Yes.

Mr. Phelps: I referred to it before.

Judge Murphy: I think we all read it.

Mr. Phelps: I beg your pardon?

Judge Murphy: I think we all read it.

Judge Goodman: It has a very strong concurring opinion in that case.

Mr. Phelps: Justice Frankfurter wrote a separate opinion, yes, Your Honor.

As Justice Frankfurter had said in another case prior to this Alabama case, and I refer to the case of Railroad Commission of Texas vs. the Pullman Company, 312 US 496, 85 Lawyers Edition 971, which I had not previously cited. In this Pullman case Justice Frankfurter——

Judge Orr: Let's get that again, please.

Mr. Phelps: 312 US 496, 85 Lawyers Edition 871.

I should like to read to you what Justice Frankfurter had

to say. I am quoting now from page 974 of the Lawyers [fol. 423] Edition and from page 500 of the U. S. Reports:

> "Few public interests have a higher claim upon the discretion of a Federal chancellor than the importance of needless friction with State policies, whether the policy relates to the enforcement of criminal law (and citing cases) or the administration of a specialized scheme for liquidating embarrassed business enterprises (citing case) or the final authority of a state court to interpret doubtful regulatory laws of the state. These cases reflect a doctrine of abstention appropriate to our Federal system where by the Federal courts exercising a wide discretion restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the Federal judiciary (citing cases). This use of equitable powers is a contribution of the courts in furthering the harmonious relation between State and Federal authority without the need of rigorous Congressional restriction of those powers."

Now that, as I say, that case, and the Alabama case, which is the most recent one, carries the doctrine further as Mr. Justice Frankfurter indicates than had previously, that it had ever previously been carried. Nothing, I think, turns upon the fact that in the Alabama case there was no re- [fol. 424] quest for declaratory relief. I think it is conceded that declaratory relief is a form of equitable relief.

Judge Goodman: The Alabama case, though, did not turn upon the assertion of a conflict of jurisdiction between the commissions. In the Alabama case, I think, the Federal court interfered on a constitutional ground, didn't it?

Mr. Phelps: The lower district court in the Alabama case had acted upon the ground——

Judge Goodman: On constitutional grounds.

Mr. Phelps: In a sense I suppose you could call it constitutional. The immediate ground being that these train runs were a—the continued operation of them was a burden on the interstate commerce.

Judge Goodman: Taking property without due process—the general constitutional grounds?

Mr. Phelps: Yes.

Judge Goodman: Justice Frankfurter's opinion was in line with many decisions which urged the Federal court not to interfere in the course of state proceedings.

But this case is a little different, isn't it, in that there is here a factual conflict or a factual conflict of jurisdiction between Federal and State bodies over the subject matter?

Mr. Phelps: That is true, Your Honor.

Judge Goodman: So there might not be any reason at all [fol. 425] for the Federal government not to interfere because you have the theory that the Federal law is supreme in the field and should operate and therefore it wouldn't be restricted by any prohibition against asserting that jurisdiction as against the jurisdiction of the State court.

Mr. Phelps: The only thing that I can say, Your Honor, is that for this Court to entertain this complaint and to adjudicate on the question involved here—in effect, restrain the action of the local, state regulatory body, and that is precisely the thing which is inimicable to the principle announced in the Alabama case, it disturbs, shall we say, that balance, that delicate balance, as Justice Frankfurter called it, between the State and Federal governments and strikes at the harmonious relationships between the Federal and the State Governments.

The Court: Well, if we were to have a state court determine what rights a Federal agency had, they might try to restrain the Federal agency. They couldn't do it. But there is the situation. You have got a Federal agency and a State agency asserting conflicting jurisdictions; in other words, you have got a State agency asserting a jurisdiction in which the Federal agency claims complete control.

Mr. Phelps: That is true, Your Honor, but——

Judge Orr: And why wouldn't a Federal court be the appropriate place to have that resolved?

[fol. 426] Mr. Phelps: Whatever action the State Commission and ultimately the State Court would take is always subject to review by the United States Supreme Court.

Judge Goodman: Only by way of certiorari.

Mr. Phelps: Yes, it is subject to review.

Judge Goodman: And Justice Frankfurter tells us all the time——

Judge Orr: Here you have a direct appeal to the Supreme Court from the decision of this Court, a right of appeal.

Mr. Phelps: That is true. But I don't understand that the parties would be prejudiced by pursuing their remedies through the State courts if they raised in the State courts the ground and argued that the action of the State commission was unlawful interference with interstate commerce and raised that Federal question. Not only would the California State Supreme Court take cognizance of their argument but if the California State Supreme Court ruled that the State Commission did have jurisdiction and on certiorari the United States Supreme Court—on a petition for certiorari the United States Supreme Court was of the opinion that the California court was wrong, I am satisfied that the parties would not suffer from any failure to act by the United States Supreme Court.

Judge Goodman: A litigant is one that would like to be sure of that. But unfortunately the Supreme Court only [fol. 427] takes over the cases it wants to, whether the litigants feel the case is unlawfully decided or not.

Mr. Phelps: The party would have a right of appeal—not a right of appeal but they—but what they would request would be to the United States Supreme Court, would not be a writ for certiorari, it would be a right to present an appeal, which is a little bit different, I think, although——

Judge Orr: Not in the State court, it wouldn't—from the State Court. There is a right of direct appeal from this three-judge court, but there wouldn't be in the State court. That would be just another petition for certiorari.

Mr. Phelps: No, Your Honor, I think the way you go up from the decision of the State Supreme Court is on a petition for appeal, and I think that is not quite the same as a petition for writ of certiorari, and it gives you the opportunity, if previous experience is the guide, to present to the United States Supreme Court fully the grounds for relief.

Judge Orr: In effect, it is the same thing, isn't it? You petitioned for appeal, and you say, no, you can't appeal or you issue writ of certiorari, and you say no. That is the same thing. They don't write an opinion on it.

Mr. Phelps: I would suppose—I haven't explored it, but I would suppose that any appeal from this court to the United States Supreme Court, although the law does provide for so-called direct appeal without the necessity of [fol. 428] going first to the Court of Appeals, that the United States Supreme Court could dismiss that appeal without going all the way, without going so far as to hear the parties in argument, to determine on briefs whether or not they would accept the appeal.

Judge Goodman: It doesn't go by certiorari.

Mr. Phelps: No, it does not. If I understand the procedure——

Judge Orr: We think you have reached the point where we give you five minutes notice. You can go ahead for five minutes.

Mr. Phelps: I think I am nearly through. There are one or two more cases which I have not yet referred to which I will ask the Court to note.

Judge Goodman: They are not in the brief?

Mr. Phelps: No, they are not. They are in this—the current of these cases, this line of cases involving the so-called doctrine of abstention. They are Beal vs. The Missouri Pacific Railroad Corporation, 312 U. S. 45, 85 Lawyers' Edition 577. Eccles vs. Peoples Bank, 333 U. S. 427, 952 Lawyers' Edition 784.

Judge Orr: The page on 333 U. S., please?

Mr. Phelps: 427. 92 Lawyers' Edition, 784. And finally Federation of Labor vs. McAdory, 355 U. S. 453, 89 Lawyers' Edition 1725.

[fol. 429] I might say Judge McKeage just advises me that there is a right of appeal as distinguished from certiorari, Your Honor, from a decision of a state supreme court, appellate court, to the United States Supreme Court.

Judge Goodman: What sort of cases? You mean in civil litigation? There isn't a right of appeal from a state supreme court, the highest court.

Mr. Phelps: I wouldn't put it as a right of appeal but the method of going up is on petition for appeal as distinguished from a petition for writ of certiorari.

Now I might make one more observation, if I may, the cases that were cited by Mr. Ozment I note were all decided before the Alabama Public Service Commission case, and

I think to that extent they are inconsistent with that Alabama case. That is all I have to say, Your Honor.

Judge Orr: The matter may be submitted?

Mr. Treadwell: Yes, Your Honor. I only want to call Your Honor's attention just to one matter. On this argument the Court should await decision by the state courts: that was presented on the motion for dismissal and was fully argued, but the latest case on that subject is a case of Pennsylvania Greyhound Lines vs. Public Utilities Commission. That has not yet been reported, Your Honor, so we have made copies of the decision, and we filed three copies, Your Honor, with the Court.

[fols. 430-431] Judge Orr: What court decided this case?

Mr. Treadwell: The District Court of New Jersey, and what they held, very applicable to this case, was without disturbing that rule they said it had no application where the question was a meaning and effect of the Federal statute, and that is the point we have here. I prepared a little memorandum of the matters which were new and I would like to file three copies of that memorandum. It's only a few pages.

Judge Orr: What is this?

Judge Goodman: You have furnished copies to counsel?

Mr. Treadwell: I will do that.

Mr. Phelps: I have just one more word, if I may, Your Honors. I am reminded in the Alabama case, in response to an observation of yours, Judge Goodman, that in that Alabama case the railroad was asserting a constitutional right, as you stated, and the railroad was denied relief, whereas here the parties are merely asserting an interpretation of a Federal statute. So the difference between the two cases, it seems to me, is such as to make the case even stronger for denying relief here, where the United States Supreme Court in the Alabama case denied the relief even though a constitutional right was said to be infringed.

Judge Orr: We will read that case.

Submitted.

[fol. 432] IN DISTRICT COURT UNITED STATES

Transcript of Proceedings on Motion for New Trial

Thursday February 19, 1953.

APPEARANCES:

For the Plaintiffs: Messrs. Treadwell & Laughlin, by Edward F. Treadwell, Esq., and Colin C. Kelley, Esq.

For the Defendants: Everett C. McKeage, Esq., J. T. Phelps, Esq., Wilson E. Cline, Esq.

For the Intervenors: C. Elmer Collett, Esq., Assistant United States Attorney.

[fol. 433] The Clerk: United Air Lines versus The Public Utilities Commission of the State of California, hearing on motion for new trial.

Judge Orr: How much time would you like to have, gentlemen?

Mr. Cline: I would like to have at least half an hour, if I may.

Judge Orr: You may have half an hour a side.

Mr. Cline: Do you wish me to proceed at this time?

Judge Orr: Yes.

ARGUMENT BY MR. CLINE FOR DEFENDANTS

Mr. Cline: Thank you, Your Honors.

Your Honors, before proceeding I again should like to read to you Section 20 and Section 22 of Article XII, the California Constitution, so that you will have it well in mind during the course of this argument. Section 20 reads:

> "No railroad or other transportation company shall raise any rate or charge for the transportation for freight, of passengers, or any charge connected therewith or incidental thereto, under any circumstances whatsoever except upon a showing before the Railroad Commission, provided for in this Constitution that such increase is justified, and the decision of said Commis- [fol. 434] sion, upon the showing so made, shall not be subject to review by any Court except upon the question whether such decision of the Commission will result of confiscation of property."

Then the part of Section 22 which I wish to read is as follows:

> "Said Commission shall have the power to establish rates and charges over the transportation of passengers and freight by railroads and other transportation companies, and no railroad or any transportation company shall charge or demand or collect or receive a greater or lesser or different compensation for such transportation of passengers or freight or for any services in connection therewith between the points named in any tariff or rates established by said Commission than the rates, fares and charges which are specified in such tariff."

I wish to say that this Section 22 of Article XII, California Constitution, is the authority upon which the California Public Utilities Commission asserts jurisdiction over the rates of the plaintiff in this case.

I read the transcripts of record in the proceedings, the briefs, very carefully, and to my mind there is considerable confusion respecting the penalty actions which have been instituted by the Public Utilities Commission against [fol. 435] the plaintiff, United Air Lines, arising out of the other action. Since those penalties have been referred to in the findings of this Court, I think it is proper that I explain the situation rather completely so that you will have a full understanding of it.

Prior to March 1st, 1951 United Air Lines had tariffs on file with the Public Utilities Commission covering its coach fares between San Francisco and Los Angeles, and these fares were thereby established by the Commission under Section 22 of Article XII of the California Constitution.

United, Prior to March 1st, 1951, applied to the Public Utilities Commission for authorization to increase such coach fares on March the 1st. The Commission refused to grant the application because insufficient information had been furnished. Nevertheless, on March 1st, United increased its fares. Subsequently the Commission issued a decision effective May 9, 1951, authorizing United to increase its fares and ordering United to make reparation of the excess fares collected between March 1st, 1951 and May the 8th, 1951, inclusive.

A petition for writ or review of this decision was filed with the California Supreme Court. The writ was denied. An appeal was taken to the United States Supreme Court. This appeal was dismissed on the ground that no substantial Federal question was involved. Subsequently the State of California filed penalty action under Section 2107, with [fol. 436] which I believe you are fully familiar, of the Public Utilities Code. These actions were filed by reason of United's violations of Sections 20 and 22 of Article XII of the California Constitution. No other statute or order of the Commission had been violated.

Now let's look to the facts of this case. The Commission has not yet established rates for United's Catalina operations under Section 22 of Article XII of the California Constitution. There is no provision in the Public Utilities Code which requires air carriers to file tariffs. In that connection I refer the Court to paragraph 12 of the findings which states that:

> "Statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day that operations are conducted by carriers without effective tariffs being on file with the defendant Public Utilities Commission."

I again say there is no provision in the Public Utilities Code and there is no provision in the constitution which requires these air carriers to file tariffs. The only provision is the provision of Section 22 which authorizes the Commission to establish rates.

I may say, one way of establishing rates is accepting tariffs which are offered for filing by the air carriers. In this case they refused to do so and there have been no rates [fol. 437] established under Section 22. Hence, United has not subjected itself to any penalties by reason of violation of the provision—of any provision of the constitution or any provision of any Public Utilities Act.

The letters from the Commission's secretary are not orders from this Commission which will support a penalty action or a contempt proceeding for refusal to comply therewith, as they do not comply with the procedural provisions of the Public Utility Act which have been set forth in the motion for new trial. In other words, these letters

are not enforceable orders of this Commission. They are merely notice to United that the Commission is commencing its administrative process.

To show that there was no confusion in this respect in the mind of counsel for United, let me read from the transcript of the hearing for preliminary injunction, August 8, 1952. I refer to page 49:

> "Judge Orr: It is our thought, Mr. Treadwell, that right now your job is to convince us that this is the proper forum to bring this action before.
>
> "Mr. Treadwell: Oh, yes, I will be glad to do that.
>
> "Judge Orr: We are more concerned about that right now than any other phase of the case.
>
> "Mr. Treadwell: Well now, the situation is this, [fol. 438] Your Honor, on that: If the Public Utilities Commission had made some order which controls this route, undertook to control the route, there is no doubt that the proper procedure would be a writ of review from that order to the Supreme Court of the United States. That would be what would be the actual way to proceed, the way you could proceed.
>
> "But there is nothing of that kind here. There is no order. We have waited now a minimum of six years, and probably much longer, according to the allegation of the complaint."

Also referring to page 62:

> "If the Commission only threaten something or if they actually had done something, if they actually had done something, our remedy of course would be to go to the Supreme Court for right of review."

I also refer you to the Answer which has just been filed today of United. Page 7, top of the page:

> "*Catalina Case.* There was no litigation, nor was there any existing administrative action concerning the route at the time that the suit was commenced."

I think that clearly shows there was no misunderstanding on the part of United.

[fol. 439] Further, any doubt about this question should have been resolved by the statements of Mr. Phelps and the testimony of Judge McKeage which we have quoted on page 12 of the Motion for New Trial.

No penalty actions will be brought because of United's prior and present refusal to file with this Commission tariffs covering its Catalina operations, not only because there is no justification for bringing a penalty action but there is no legal basis for bringing any penalty action at the present time.

Assuming that the letters from the Commission's secretary are enforceable and appealable orders, that they have become final, no petition for rehearing has been filed with the Commission and no petition for writ of review has been filed with the California Supreme Court.

I might say, however, that whatever constructive effect is given to these letters by the Federal Courts, I am confident that the Commission, if permitted to do so, will not treat these letters as enforceable orders but will institute an investigation on its own motion should United still refuse to file its tariffs. Justice would require that United be given such an opportunity to appear before the Commission in accordance with established procedure.

Judge Goodman: Didn't Mr. McKeage testify that these letters were written after he gave his opinion that the [fol. 440] Public Utilities Commission had jurisdiction and that it was his belief that they had jurisdiction?

Mr. Cline: Yes. It certainly is still his belief that they have jurisdiction.

Judge Goodman: Isn't then the rest of that a lot of folderol?

Mr. Cline: Not necessarily. There may be some cases that are presently——

Judge Goodman: And the Commission is going to go through some motions to determine that which it has already decided?

Mr. Cline: That is the administrative process, Your Honor. After all, at the time that those letters were issued, the plaintiffs in this case had not had an opportunity to fully present their aspects. There were no facts which the Commission had to consider. It was just based on hear-

say, you might say, matters of its own general information and knowledge. They were just preliminary to the administrative process. They were by no means the end of the process. And I might say at this time too that that certainly is a matter which should be decided by the California Supreme Court rather than by the Federal Courts, the effect which should be given to letters of a secretary of our Commission. Although this Court, of course undoubtedly in the decision of this case, has made a determination with respect to them, I don't think that that determination would [fol. 441] be binding on the California Supreme Court if such matter were reviewable by them in connection with another matter, in the same way that you wouldn't be bound by a ruling of the California Supreme Court in respect to the effect of the letters.

Judge Goodman: Isn't the demand that an administrative hearing be held by the Commission an assertion of the jurisdiction?

Mr. Cline: I am coming to that next, Your Honor.

Judge Goodman: It seems to me that in the case where the Federal Commission is exercising jurisdiction, the fact that the State Commission says: We want to assert jurisdiction, that it doesn't make much difference what form that assertion of jurisdiction takes, that creates the issue then—doesn't it?

Mr. Cline: The only threat of assertion of jurisdiction that is admitted and the only threat that exists at the present time is the intention on the part of the defendant Commission, if permitted to do so, to institute an investigation on its own motion. The only action taken by the Commission to date has been preparatory to the institution of such an investigation. The appearance and defense of United in such investigation would not impose irreparable injury on United in an equitable sense. Otherwise in every case where the jurisdiction of the Commission is questioned, application could be made to this Court for relief on the [fol. 442] ground that the Commission actually doesn't have jurisdiction, the parties being subjected to an irreparable injury unlawfully. Due process contemplates the type of injury which may be sustained in an appearance before administrative agencies and Courts even though it may

ultimately be found that the agency or Court has no jurisdiction.

Judge Goodman: If the Civil Aeronautics Authority has exercised jurisdiction Federally (as I remember, the Civil Aeronautics Authority has exercised jurisdiction over rates between California and Nevada); and then the State of California Commission sent a communication or announces that it was going to hold a hearing to determine the matter of jurisdiction, do you think or is it your point that this Court would have no jurisdiction, that it would have to wait until the California Commission held a hearing to determine that matter?

Mr. Cline: That is correct.

Judge Goodman: What authority is there for that?

Mr. Cline: There is the authority that the California Public Utilities Commission has the right to make such investigations as it deems necessary to enable it to carry out its functions under the law.

Judge Goodman: Even if it is clearly in the Federal field?

Mr. Cline: That is where we disagree with you. We say [fol. 443] it is not clearly in the Federal Field.

Judge Goodman: Let's take a case where it was purely Federal.

Mr. Cline: If we admitted it was purely Federal——

Judge Goodman: If your contention is that it is purely Federal, the Federal Court couldn't have any jurisdiction and it had to allow the State Court, the State Commission, to determine that question?

Mr. Cline: My position is that where the matter is not clearly settled, where it is still up in the air and it is questionable, that the Public Utilities Commission has the right, on its own motion, to hold an investigation and to determine the jurisdictional question.

Judge Goodman: Then your point is purely as to the timeliness, the timing of the proceeding?

Mr. Cline: That's correct.

Judge Goodman: Rather than the fundamental principle that is involved?

Mr. Cline: That's correct. As I say, if the Commission was of the opinion that the matter was clearly settled, we would not be here.

In that connection I wish to refer to the case of Petroleum Company versus Public Service Commission 304 U. S. 209. That case said that the expense and allowance of litigation is part of the social burden of living under government. [fol. 444] When the only ground for interfering with the state procedure is the cost of preparing for a hearing, there is no occasion for equitable intervention.

The majority of the Supreme Court in the case of Public Utilities Commission versus United Fuel Gas, referred to in the intervenors answer to our motion for a new trial, distinguishes this case on the ground that the appeal to equity sought to anticipate the appropriate exhaustion of administrative remedies and that the regulation of intra-state rates was alone involved. In the case at hand the plaintiffs are seeking to anticipate the administrative process, and our position is, of course, that the rates are intra-state instead of inter-state rates.

In this connection I refer to a question by Judge Goodman on page 31 of the transcript of the hearing August the 8th, 1952:

> "Judge Goodman: Would there be any more reason for the Congress wanting to regulate the rates in a case where an airplane went from one point in California to another point part of the way over another state any more so than in the case where it went from San Francisco to Los Angeles and over a part of the water, the Pacific ocean; what is the difference there?"

The answer to this question is an unequivocal yes, that [fol. 445] there is a difference. If Congress didn't provide for regulation of the rates between points in California, when part of the flight, for example, was over Nevada, there would be no regulation whatsoever. That's clearly interstate commerce under the Interstate Commerce Clause of the Federal Constitution.

I refer you to the case of Hanley versus Kansas City Southern Railway, 187 U. S. 617 at page 620.

On the other hand, if Congress hasn't provided for regulation of the rates between San Francisco and Los Angeles where part of the flight is over the high seas, California can regulate such rates because here only one state is involved and such rates are a matter of local concern.

There we again refer you to the case of Wilmington Transportation Company versus Railroad Commission, 236 U. S. 151 at 156.

The legislative history of the Civil Aeronautics Act clearly shows that the Federal Authority has not preempted the field of regulation of intrastate rates. I might say that we have briefed that very fully in our brief to the United States Supreme Court. I intended to read you sections of it showing that there was clearly no intention to preempt the field of regulation of intrastate rates by Congress. I don't believe I will have time here. There are quite a number of——

[fol. 446] Judge Goodman: There isn't any question about that.

Mr. Cline: Fine.

Your Honors, next I shall like to have the Court consider the case of Public Service Commission of Utah versus Wycoff Company, Inc., 344 U. S. 237. The facts have been set forth in our motion for new trial. I do wish this Court, however, to carefully consider certain statements appearing in the opinion of the Supreme Court in their application to the case presently under consideration by this Court.

First I refer to the statement—I have before me here the Lawyers Edition. It may not be too easy to follow unless it relates to Head Note 1. First I refer to the statements in addition to the effects that will appear in our discussion of the declaratory relief.

> "It is wanting in equity because there is no proof of any threatened or probable act of the defendants which might cause the irreparable injury essential to equitable relief by injunction."

That statement there doesn't say that there was no proof of any threatened or probable act. It merely says that there was no proof of any threatened or probable act of the defendants which might cause the irreparable injury essential to equitable relief. And that is what I want to point out. There was evidence of threats.

Further on, the Court itself says in the majority opinion:

> [fol. 447] "We may surmise that the purpose to be served by a declaratory judgment is ultimately the

same as respondent's explanation of the purpose of the injunction it originally asked, which is

'To guard against the possibility that said Commission would attempt to prevent respondent from operating under its certificate from the Interstate Commerce Commission.'

"In this connection Wycoff versus Public Service Commission——"

Utah Supreme Court case,

"—is brought to our attention. From this it appears that respondent and its predecessors in interests long made it a practice to obtain from Utah Commission certificates to authorize this carriage of film commodities between points in Utah. But the Supreme Court in Utah, in the cited case, sustained the Commission in denying such an application upon a finding that the field already was adequately served. We are also told that the Commission filed a petition in Utah State Court to enjoin respondent from operating between a few specified locations within the state, but that process was never served and nothing in the record [fol. 448] tells us what has happened to this action. We may conjecture that respondent fears some form of administrative or judicial action to prohibit its service on routes wholly within the state without the Commission's leave. What respondent asks is that it win any such case before it is commenced."

I also wish to read a part of a statement of facts by Mr. Justice Douglas in his dissenting opinion. He states:

"Respondents hold a certificate of public convenience and necessity from the Interstate Commerce Commission for the transportation of motion picture films and news reels from Salt Lake City, Utah, to points in Utah, Idaho and Montana. Their transportation to Utah points is interstate commerce according to the Court of Appeal; and with that conclusion I agree since the movement in Utah is part of a continuing interstate stream. The threat of interference with that interstate activity by the Utah Public Service Com-

mission is clear and immediate. First. The Utah Commission brought suit to enjoin those interstate activities and that suit is now pending in the Utah Court. Second. The Commission's answer in the District Court denied that it was interfering with interstate commerce, not because it did not intend to prevent respondent [fol. 449] from operating, but on the ground that the operations were deemed to be intrastate commerce and therefore subject to its regulation. Similarly, the District Court's finding that there was no interference with interstate commerce was based on an acceptance of the Commission's contentions as to the nature of respondent's business.

"In their brief here petitioners assert that the Utah Commission *'will prevent the respondent from conducting'* this business *'unless and until he is authorized to do so by appropriate administrative order'* of the Utah Commission, since in the Commission's view the transportation is in intrastate commerce."

And omitting some:

". . . I have said enough to show that the judges who heard this case below knew that they were dealing with a live, active contest that threatened serious consequences to respondent, not with a hypothetical question that might have practical repercussions only in the remote future."

The next statement to which I would like to direct this Court's attention is:

". . . this dispute has not matured to a point where we can see what, if any, concrete controversy will [fol. 450] develop. It is much like asking a declaration that a state has no power to enact legislation that may be under consideration but has not yet been shaped up into an enactment. If there is any risk of suffering penalty, liability or prosecution, which a declaration would avoid, it is not pointed out to us."

In that connection I would like to say that a rate order of the Public Utilities Commission is a legislative act of

an administrative body, and I have outlined to you the procedure which must be followed by the Commission in enacting such legislative acts. There has been no such procedure followed by the Commission, and the status at the present time is the same as though there is no legislation whatsoever on this subject matter.

> "Even when there is incipient Federal-State conflict, the declaratory judgment procedure will not be used to pre-empt and pre-judge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National [fol. 451] Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance . . .
>
> "But, as the declaratory proceeding is here invoked, it is even less appropriate, because, in addition to foreclosing an administrative body, it is incompatible with a proper Federal-State relationship."

I think that is just exactly the situation we have here.

> "Declaratory proceedings in the Federal Courts against state officials must be decided with regard to the implications for our Federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders . . ."

That is not done by this Commission as yet.

> ". . . and the primary right to take evidence . . ."

We have taken no evidence.

> ". . . and make findings of fact."

There have been no findings of fact made by the Public Utilities Commission.

"It is the State Courts which have the first and last word as to the meaning of State Statutes . . ."

The State Court should determine the meaning of those letters written by the secretary of the Commission.

[fol. 452] ". . . and whether a particular order is within the legislative terms of reference so as to make it the action of the state. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by the Courts of the state affected. Anticipatory judgment by a Federal Court to frustrate action by a state agency is even less tolerable to our Federalism."

Judge Goodman: We didn't make any decision that had for its effect the interpretation of the meaning of any statute. We simply held the Federal Statute that the Federal Agency had——

Mr. Cline: That was by way of defense, and we will come to that in a minute.

"Is the declaration contemplated here to be res judicata . . ."

Skipping down——

"The procedures of review usually afford ample protection to a carrier whose Federal rights are actually invaded. and there are remedies for threatened irreparable injuries. State Courts are bound equally with the Federal Courts by the Federal Constition and laws. Ultimate recourse may be had to this Court by cercaria if a state court has allegedly denied a Federal right.

[fol. 453] "In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed."

Now this is the part that I am referring to.

"The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts."

And that is exactly what this plaintiff is doing before this Court. It is coming before this Court and asking you to make a determination which will serve as a defense in any proceeding which the Public Utilities Commission of the State of California might institute.

Judge Goodman: I don't see where you get that from, counsel, on the record in this case?

Mr. Cline: Well, we are not making any claim under Federal Statute. Our only claim is under the article, Section 22 of Article XII of the Constitution.

Judge Goodman: The plaintiff is coming in and saying: We are now being regulated by the Federal Agency and the State Agency wants to regulate us.

Mr. Cline: Why is he here, he is here because we say we are going to regulate him under——

Judge Goodman: He doesn't want to get caught in between the two juggernauts approaching him, one from each side, and he doesn't want to get caught in between.

[fol. 454] Mr. Cline: He is here because we are making a claim under a provision of the Constitution of the State of California. We are not making any claim under Federal Statute. That is what he will assert as a defense, and that is what a language says he will not be permitted to do.

Judge Orr: They don't say that.

Mr. Cline: Yes they do. They say he shall not be permitted——. Let me finish reading this and we will discuss further, if you will permit me to do so.

Judge Orr: Just a moment, please. I would like to ask you a question.

Mr. Cline: Surely.

Judge Orr: I have in mind this. Isn't the situation somewhat reversed, what you are speaking of? This isn't a question where the Government is attempting to meddle in state affairs. It is a question where they are stopping the state from meddling in the Federal affairs.

Mr. Cline: We are not trying to meddle in Federal affairs. What we are trying to do is exercise our authority under the Constitution of the State of California.

Judge Orr: I had this in mind, aren't you trying to usurp jurisdiction where you haven't got any? In other words——

Mr. Cline: If we accept your view of the cases, yes. If

we say that the Federal Government has pre-empted the field of regulation, we have no authority to regulate this [fol. 455] route. But that's deciding the matter before it is even heard by the state body.

Judge Goodman: Counsel, why shouldn't it be decided before the state body decides it?

Mr. Cline: Because that is a matter of defense. Under the Federal Statute that is set up as a matter of defense.

Judge Goodman: What do you mean by that?

Mr. Cline: Let me read this language.

Judge Goodman: You mean to say that it clearly appears that the Federal Agency that's got authority and decides that it has authority, that it has to wait until the state agency decides the question? What does the matter of defense have to do with it?

Mr. Cline: Well, let me read this language.

Judge Orr: I don't know whether I am following you correctly or not. You can clear me up if I am not.

Mr. Cline: This is the picture——

Judge Orr: In other words, according to the way I am getting it, you are saying that the Federal Court must hold its hand until such time as the State Court makes a determination on whether——

Mr. Cline: My point is this——

Judge Orr: —whether this is Federal question or not.

Mr. Cline: My point is that this Federal issue can just as satisfactorily be decided by permitting the Commission [fol. 456] to hold its order of investigation, permitting the matter to go to the California Supreme Court, and then directly to the United States Supreme Court. The Federal issues will be fully protected under that procedure. And, I may say that that procedure is a very fast procedure.

Judge Orr: Won't it be just as fast, here Mr. Cline, just as fast decided here if you appeal to this Court?

Mr. Cline: The difficulty there is—so the California Supreme Court says at any rate—the fundamental obligation of the State Courts is to decide questions of state law. It very well may be, when this matter goes up to the State Supreme Court of the State of California, if it does, that they will have exactly the same attitude towards the Federal question that you have, and they will be obligated to decide it in the same way.

Judge Orr: I take this view, we are not stating that the State of California has a right to decide questions of state law. Their law may be entirely valid. The operation of the commission under that law within the orbit that they are authorized to act may be perfectly valid. But in the state the state has not said to its Commission that you shall have authority to regulate interstate commerce. Now here we are asked to say: Is this interstate or is it intrastate. If it is interstate commerce, you admit, I imagine, that you have no business trying to regulate it. If it is intrastate why, [fol. 457] you do. We said to you in the decision that this is interstate commerce, or an interstate transaction solely within the regulation by the Federal Commission and that you are without authority to act.

Mr. Cline: Our position is——

Judge Orr: Granting all, everything that the State Statute authorizes you the right to do is legal, if you stay within that. But if you step out of the orbit of that authorization and try to operate in interstate commerce, in which you have no authority——

Mr. Cline: That is a matter of defense. The difficulty here is that you have already made your decision that it is interstate commerce.

Judge Orr: Yes.

Mr. Cline: As far as you are concerned. If that matter were questionable in your minds I think it would be easier for you to follow the language of this decision and the argument which I am making—if you felt that it was. But the difficulty here is that you have already decided this is interstate commerce and there is no question in your mind that it is interstate commerce. But——

Judge Goodman: Why isn't it interstate commerce?

Mr. Cline: Why isn't it interstate commerce?

Judge Goodman: Yes.

Mr. Cline: Under our interpretation of the Civil Aero- [fol. 458] nautics Act the use of the language there is meant to apply to the situation of interstate commerce where the flight goes through another state rather than over the seas.

Judge Goodman: But the statute says: "Goes over the water."

Mr. Cline: It is our——

Judge Goodman: You are fighting the statutes, aren't you, there? The statute specifically says——

Mr. Cline: It does not say "Over the water." It says any place outside thereof. Now there is a matter pending before the United States Supreme Court at the present time in which the State of California is claiming jurisdiction over the waters between Catalina——

Judge Orr: Has that been accepted by the Supreme Court?

Mr. Cline: Has the Master's Report been accepted?

Judge Orr: Yes. I mean, when will we get a decision on that?

Mr. Cline: I don't know. But certainly until the Supreme Court adopts the Master's Report on that, the matter is open for further consideration. And then, in addition to that, we don't know what this session of Congress is going to do. They may very well decide that the State of California is entitled to exercise jurisdiction over those waters. We don't know. And, as I say, that matter is up in the air.

[fol. 459] Judge Goodman: Well, you concede that there is Federal jurisdiction if the airplane goes from San Francisco over a part of Nevada to Los Angeles?

Mr. Cline: Yes.

Judge Orr: That is interstate commerce?

Mr. Cline: That is interstate commerce.

Judge Goodman: What is the difference if it goes from San Francisco out into the Pacific ocean and then to Los Angeles?

Mr. Cline: Congress has a definite interest in providing regulation when the flight goes over Nevada. California can't regulate that; Nevada can't regulate that. It is interstate commerce under the Interstate Commerce Clause of the Constitution. Now as to flights which go out over the Pacific ocean, true enough the United States has an interest and California has an interest. It is a matter of local concern primarily with California, but the United States has an interest not only with flights which go out over the high sea but they have an interest over flights within the State of California. They regulate it from the point of view of safety regulations. And our point is that Congress did not intend, through the enactment of the Civial Aero-

nautics Act, to put within the scope of the regulation by the Civil Aeronautics Board matters of local concern which can be regulated by the State of California. As to those [fol. 460] matters which can't be regulated by the State of California, where they go through Nevada, Congress certainly had reason to enact that legislation.

Judge Goodman: That is a primary question that you can raise on appeal, can't you?

Mr. Cline: Yes. What we object to is the possibility of our being put to the expense of coming before this Court every time anyone raises a question as to our authority to act or as to our jurisdiction.

Judge Goodman: You just take an appeal from this decision to the Supreme Court, and if we are wrong on the question as to interpreting what it means by saying "A place outside of the state," that will settle it, won't it?

Mr. Cline: Our opinion is that if we take an appeal, the United States Supreme Court won't get to that point.

Judge Orr: I think if your theory is right, that this is intrastate commerce, we are wrong.

Mr. Cline: There is a point that I have to reach before you get that. Let me read the rest of this paragraph here:

> "If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under Federal law, it is doubtful . . ."

We are making no claim whatsoever under Federal law. We are certainly the declaratory defendant and we are the only one whom the plaintiff says has threatened to take any action.

> [fol. 461] ". . . it is doubtful if a Federal Court may entertain an action for declaratory judgment establishing a defense to that claim."

And that would certainly clearly be a defense. They will come in and say: You have no jurisdiction. Why do you have no jurisdiction? For the reason that Congress has pre-empted a field of regulation in these rates insofar as the Catalina operation is concerned.

> "This is dubious even though the declaratory complaint sets forth a claim of Federal right, if that right

> is in reality in the nature of a defense to a threatened cause of action."

And that is exactly what we have here.

> "Federal Courts will not seize litigations from State Courts merely because one, normally a defendant, goes to Federal Court to begin his Federal-law defense before the State Court begins the case under state law."

Now we have one more short paragraph which I would like to read before we leave this case.

> "Since this case should be dismissed in any event, it is not necessary to determine whether, on this record, the alleged controversy over an action that may be begun in the state court would be maintainable under [fol. 462] the head of Federal-question jurisdiction. But we advert to doubts upon that subject to indicate the injury that would be necessary if the case clearly rested merely on threatened suit in state court, as for all we can learn, it may."

Judge Murphy: Right there you seem to get at the nub of our decision. We held as a matter of fact intent is a question of fact, that you had threatened irreparable injury. We found that.

Mr. Cline: You found it as a fact, but will it be supported by the record?

Judge Murphy: I think so.

Mr. Cline: There may be irreparable injury? There may be injury, but is it a type of irreparable injury which entitles this Court to grant the equitable relief requested? That's another question. The two cases are very very similar.

Judge Murphy: If the United had to come in and defend itself against proceedings taken before the Commission which would certainly result in an expenditure of considerable thousands of dollars, might not that be interpreted as an irreparable injury?

Mr. Cline: Well, on the other hand, would you say that the State of California is suffering irreparable injury by reason of the fact that we have to come before this Court

to defend ourselves? The obvious—the answer is obviously [fol. 463] no. The answer in the other case is no. It is the type of injury that our society expects its members to sustain.

Judge Murphy: That is under your theory of the ordinary cost of Government.

Mr. Cline: Suppose we go up to the Supreme Court and this Court is reversed and we have to go through all the other procedure, we have sustained injury. But there is no place we can go to recover it.

Judge Murphy: But is that——

Mr. Cline: My point is, had they awaited our order of investigation, taken the matter up through the normal channels, up to the California Supreme Court, to the United States Supreme Court if necessary, then the matter could have been decided just as inexpensively, just as expeditiously, and there would not have been the element of this friction between the State and Federal Government. You have the United States Supreme Court resolve the Federal issues. Before the matter gets to the United States Supreme Court, the State Court has settled all the state issues that are involved.

Judge Goodman: I don't see that there is any difference in what you say as to the form of the appeal. If you take an appeal here and you lose, you will have to go through with your procedure.

Mr. Cline: No. If we *we* take an appeal and we lose——

Judge Goodman: If you win, you will then, in the regular [fol. 464] course of events, assert your—wait a minute—wait a minute now. Now, what would have happened if the matter proceeded without the intervention of the Federal Court, and the United having an adverse judgment against you in the State Supreme Court, and you took the petition for review to the Supreme Court?

Mr. Cline: I might say this, that if we had an adverse judgment against us by the State Supreme Court of the State of California, we very likely would let the matter stop there.

Judge Goodman: Now you are talking about practical things instead of law.

Mr. Cline: From a practical point of view, the State Public Utilities Commission of the State of California if it has

an adjudication by the State Supreme Court of the State of California would feel that it has gone as far as is necessary or practical for it to go. Now we don't have the same thing here.

Judge Orr: There is some assurance in the case, sure, that penalties will not be imposed. But I think in the first instance——

Mr. Cline: That is the point I want to bring out. It's a new point, a new approach that we developed today.

Judge Orr: I wonder if you would permit me to finish?

Mr. Cline: Excuse me, Your Honor.

Judge Orr: I have this in mind, that I think the activat-
[fol. 465] ing motive in the first instance in bringing this action was the fear of imposition of this thousand dollars a day—isn't it?—or something of that kind—that penalty, and if they waited some length of time and finally lost out that would be a rather irreparable injury, and they were in a sort of a, as Judge Goodman put it, between two pincers here.

Mr. Cline: If you want——

Judge Orr: If they were to stand by and let you go ahead and you saw fit later to impose those penalties, they were in a bad fix.

Mr. Cline: Those are the allegations in the complaint. I have attempted to point out today there is no foundation in law for the imposition of such penalties. The only authority that we are operating under, that we are seeking to exercise jurisdiction at the the present time, is the authority to establish rates. Now there is no provision in the Public Utilities Code which says that United has to file tariffs with the Commission.

Judge Orr: What would you do if they don't comply?

Mr. Cline: What do we do if they don't comply? We have two alternatives. One,—well, the first alternative—only one course, is to institute an order of investigation on our own motion. Of course someone on the outside can file a complaint with us. But since we are aware of the situation, we would undoubtedly institute the motion, the investiga-
[fol. 466] tion, on our own motion. Now at that time we could go into their rates and elicit information and find out whether or not those rates were reasonable and just,

and if they were not reasonable and just we could establish rates which we think were reasonable and just. The other alternative is to say: Well, these are the rates you have been charging over a period of time. We assume they are reasonable, unless someone comes in and complains. Therefore, all we will do is direct you to file a tariff. And then after we have our investigation, follow the procedure that is outlined in the Public Utilities Code, we will issue an order. Now that order will not be in force until it becomes final. And the procedure contemplates that the defendant, a would be defendant before us or the respondent, would file a petition for rehearing, and the Commission would review the matter again. The matter is brought up on petition for rehearing. And if we deny the petition for rehearing, the plaintiff, United, could go to the Supreme Court of the State of California and get a stay order which would stay the effect of the decision until such time as the Supreme Court of the State of California had rendered its decision, and then if the decision of the Supreme Court of the State of California was in favor of the Commission they could get the same type of stay granted by the United States Supreme Court.

Judge Murphy: Would those rates that you would have [fol. 467] originally established become retroactive as of the date of the first hearing?

Mr. Cline: So long as they didn't increase the rates, we would have no cause of action to institute—I mean, no right to institute penalty actions. However, as I pointed out to you, Section 20 and Section 22 of the California Constitution say that "No railroad or other transportation company shall increase its rates without establishing that they are reasonable."

Judge Goodman: Well, I think that all that you have said, counsel, might have some applicability if you had an ordinary case where some air line company or other concern was complaining against some order of the state body. But this is a case where it is peculiarly necessary, it seems to me, for the imposition of equity, because this concern in the particular area concerned has been under Federal regulation for a number of years and, being under Federal regulation, it finds itself confronted with the claim of state

jurisdiction. Why shouldn't it go into the Federal Court and ask for relief under thos- conditions, and under conditions where we find that the Federal Agency intervenes and takes the part of the plaintiff and aligns itself with it and says, yes, we have been regulating this plaintiff and we have exercised jurisdiction. Now under those conditions isn't it reasonable, in the exercise of its jurisdiction, for [fol. 468] the Federal Court to determine that matter? It isn't like the ordinary case that you were speaking of and that you have reference to.

Mr. Cline: I have to come back to the language of the Supreme Court in the Public Service Commission of Utah versus Wycoff where it says:

> "This is dubious even though the declaratory complaint sets forth a claim of Federal right, if that right is in reality in the nature of a defense to a threatened cause of action."

Judge Orr: We had talked about giving you 30 minutes. You started out with 30 minutes. We have now given you 50. However, we have interrupted you a good deal.

Mr. Cline: I appreciate that very much. I will try to finish as quickly as I can, Your Honor.

In your consideration of the cases of Rice versus Santa Fe Elevator Corporation and Clover Leaf versus Patterson—that is, in your reconsideration of those cases, I would like to point out that in neither case was there a three judge District Court invoked, and in neither case was the issue of exhaustion of the administrative process raised.

In the case of Bethlehem Steel Corporation versus New York State Labor Relations Board, it is not authority for the three judge court to assume jurisdiction. The appeal in that case to the United States Supreme Court was from the New York Court of Appeals.

[fol. 469] We are likewise contending here that this matter should be permitted to go to the United States Supreme Court by way of an appeal from the California Supreme Court.

The case of Public Utilities Commission of Ohio versus United Fuel Gas Company may be distinguished because the administrative process in that case had been exhausted.

The matter had been pending in the Federal Courts from July 3, 1935, to December 8, 1942, over seven years at the time the argument before the United States Supreme Court, and the majority of the Court felt that such matters should be finally disposed of after such an undue length of time pending in the Federal Courts.

I have intended to quote considerably again from the case of Alabama Public Service Commission versus Southern Railway, but I am rather inclined to believe that you have fully considered that case.

Under Section 2281 the jurisdiction of this three judge court is based upon the ground of unconstitutionality of a state statute. This Court states it has not reached the issue of unconstitutionality of the state statute. The Court should at least make a finding that a substantial Federal constitutional question is involved and state clearly what that issue is. If no substantial Federal constitutional issue has been raised, that three judge court should dissolve itself.

[fol. 470] I refer you to California Water Service Company versus the city of Redding 304 U. S. 252, city of Springfield versus U. S. 99 Fed. 2nd 860 (*cercariae* denied 306 U. S. 50). In that connection we have that problem before us. In order to protect ourselves we are going to have to take an appeal not only to the United States Supreme Court but also to the Court of Appeals, because it is just possible that when this matter will get up before the United States Supreme Court they would say that the three judge court had been improperly invoked because there is no substantial Federal constitutional issue involved, that the three of you nevertheless do constitute a District Court, and for that reason our appeal should have been taken to the Court of Appeals. So you can see that the procedure with which we are confronted is even, in the Federal Courts, no simple matter.

Judge Goodman: I don't think there is any merit in that at all, counsel, because we covered that specifically.

Mr. Cline: You stated that you didn't reach the issue.

Judge Goodman: Well, if you look at the case that came up in the Supreme Court (that case of ——) ——the Supreme Court considered that question—that case from

Hawaii—Ackerman against someone—that there they considered it, because the Court itself pointed out that it was deciding the case both as a three judge court and as a District Court.

Mr. Cline: If you are deciding it as a District Court, [fol. 471] we have to go to the Court of Appeals.

Judge Goodman: We pointed out in this case, however, that we were deciding the case as a three judge court.

Mr. Cline: But our problem is, we are going to make the argument that the penalty section is not applicable to these facts. If the penalty section isn't applicable, how can there be any substantial Federal constitutional issue, when the Federal constitutional issue depends upon that penalty section? If it isn't applicable, and we say it is not, then there is no Federal constitutional question involved.

Judge Goodman: There are on grounds of jurisdiction.

Mr. Cline: Are on the grounds of jurisdiction, the other grounds, of jurisdiction, require us to go to the Court of Appeals.

Judge Goodman: The authorities sustain the viewpoint if the Court properly takes jurisdiction they may decide the case as a three judge court.

Mr. Cline: In view of the interpretation which has been given to the letters from the secretary of the Commission, we have deemed it advisable to make reference to the Johnson Act. The jurisdiction of this three judge court is based solely on repugnance of the order to the Federal Constitution; otherwise there would be no ground for jurisdiction. That being the case, it is our contention that the [fol. 472] Johnson Act will apply and that the injunction should not issue in this case because the letters of the secretary of the Commission, if they are orders, are orders affecting rates, and the Federal Courts under the circumstances set out in the Johnson Act have no authority to issue an injunction affecting orders relating to rates.

Also I again wish to state that the judgment in its form is too broad in scope and again I say there is no evidence whatsoever that the defendants are seeking to regulate any aspect of the plaintiffs' operations but their rates.

We admit that we had no authority with respect to the regulation of interstate commerce, that has been preempted by the Federal Act, and we are attempting to exercise no jurisdiction at all in that respect.

Judge Orr: These matters, have you got them covered in your memorandum?

Mr. Cline: Yes I have.

Judge Orr: The time has expired.

Mr. Cline: I just wish to cite one more case, if I may be permitted to do so.

Judge Goodman: Is it in your memorandum?

Mr. Cline: No. I am citing it because it is a matter brought up in the absence of Mr. Treadwell. It is the case of Kelly versus Washington 302 U. S. 182 Lawyers Edition 3, which states that if a state has failed to exercise [fol. 473] authority for a considerable period of years is immaterial.

Judge Orr: We are of the opinion that we don't think we will require any argument from you.

Mr. Treadwell: I hardly thought so.

Judge Orr: The matter will be submitted.

[fol. 474] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 475] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 823

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, and PETER E. MITCHELL, Members of and Collectively Constituting the Public Utilities Commission of the State of California; EVERETT C. MCKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, and J. THOMASON PHELPS, Legal Advisers of the Public Utilities Commission of the State of California, Defendants-Appellants,

vs.

UNITED AIR LINES, INC., a corporation; and CATALINA AIR TRANSPORT, a Corporation, Plaintiffs-Appelles; Civil Aeronautics Board, Intervenor-Appellee

STATEMENT BY APPELLANTS OF POINTS RELIED ON AND DESIGNATION OF RECORD FOR PRINTING—Filed June 1, 1953

Pursuant to Rule 13 of this Court, appellants herein state that they intend to rely upon all the points designated in their Assignment of Errors and Prayer for Reversal.

Appellants herein deem the entire certified transcript of the record (including the Agreed Statement of Facts), as filed in the above-entitled cause, save and except that por-
[fol. 476] tion which consists of the exhibits (other than the Agreed Statement of Facts), necessary for the consideration of the points relied on, and appellants hereby designate the same for printing.

Dated, May 28, 1953.

Respectfully submitted, Everett C. McKeage, Chief Counsel; J. Thomason Phelps, Senior Counsel; Wilson E. Cline.

[fols. 477-481] AFFIDAVIT OF SERVICE (omitted in printing)

[fol. 482] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 823

[Title omitted]

DESIGNATION BY PLAINTIFFS-APPELLEES OF RECORD FOR PRINTING—Filed June 2, 1953

Pursuant to Rule 13 of this Court, plaintiffs-appellees herein deem the entire transcript of the record (including the Agreed Statement of Facts and the documents attached thereto and Exhibits 1, 2, 3, 4 and 5 referred to on pages 13 to 16 of the transcript) as filed in the above entitled cause, necessary for the consideration of the points relied [fol. 483] upon, and plaintiffs-appellees hereby designate the same for printing.

Dated: May 29, 1953.

Respectfully submitted, Treadwell & Laughlin, Edward F. Treadwell, Reginald S. Laughlin, Attorneys for United Air Lines, Inc., and Catalina Air Transport, Plaintiffs-Appellees.

[fols. 484-487] AFFIDAVIT OF SERVICE—(Omitted in Printing)

[fol. 488] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 823

[Title omitted]

STIPULATION AS TO CERTAIN EXHIBITS—Filed June 4, 1953

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto that Exhibits

1, 2, 3, 4, and 5 referred to on pages 13 to 16 of the Reporter's Transcript filed in the above entitled action as part of the record on appeal therein are voluminous and include two large maps, and the same need not be printed [fols. 489-491] or reproduced in the transcript of record, but the same may be referred to in the briefs and on the argument of the appeal by any party, and may be submitted to this Court with the same force and effect as if printed.

Everett C. McKeage, J. Thomason Phelps, Wilson E. Cline, Attorneys for Defendants-Appellants; Edward F. Treadwell, Reginald S. Laughlin, Treadwell & Laughlin, H. Tempelton Brown, John T. Lorch, Edmund A. Stephan, Mayer, Meyer, Austrian & Platt, Attorneys for Plaintiffs-Appellees; Lloyd H. Burke, United States Attorney for Northern Dist. of California; Charles Elmer Collett, Asst. United States Attorney for Northern Dist. of California; James E. Kilday, Special Asst. to Attorney General; Emory T. Nunneley, Jr., O. D. Ozment, Robert L. Stern, Acting Solicitor General, Department of Justice, Attorneys for Intervenor-Appellee.

So Ordered by the Court. —— ——, Chief Justice.

[fol. 492] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

[Title omitted]

ORDER POSTPONING JURISDICTION—June 15, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court in this case and of the motion to dismiss or affirm is postponed to the hearing on the merits.